IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~939~~ 70-34

SIERRA CLUB,

Petitioner,

v.

ROGERS C. B. MORTON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE WILDERNESS SOCIETY, IZAAK WALTON LEAGUE OF AMERICA, AND FRIENDS OF THE EARTH AS AMICI CURIAE

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (R. 208-235) is reported at 433 F.2d at 24. The opinion of the United States District Court for the Northern District of California (R. 186-199) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1970. The petition for a writ of certiorari was granted on February 22, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Sierra Club has standing to sue to prevent damage to Sequoia National Game Refuge, Sequoia National Forest, and Sequoia National Park under statutes designed to protect these areas as:

a. A national conservation organization whose purpose is to protect the environment;

b. A local conservation organization with a long history of interest in protecting the Sierra Nevada Mountains and particularly these specific areas;

c. Representative of its members who have standing to protect public lands held in trust for them; or

d. A user itself of these areas and representative of its members who are users.

2. Whether the court of appeals erred in reversing the district court's grant of a preliminary injunction by requiring plaintiff to show a reasonable certainty that it would prevail and finding no irreparable injury despite the threatened start of construction of a large resort, highway, and electrical transmission line.

3. Whether defendants are violating Federal statutes by allowing the construction of a large resort and connecting highway and electrical transmission line in Sequoia National Game Refuge, Sequoia National Forest, and Sequoia National Park. More specifically whether defendants may—

a. Issue a permit to build a large resort on 13,000 of the 15,000 acres of land in Sequoia National Game Refuge even though Congress has provided that all uses of the refuge must be consistent with its purpose to protect wildlife.

b. Issue a permit for 13,000 acres of land in a national forest for a resort even though Congress has imposed an 80-acre limit on term permits for resorts and the permit is not genuinely revocable either in law or in fact.

c. Authorize a major highway to be constructed across Sequoia National Park which will harm the park and will be used to allow visitors to come to a commercial resort outside the park.

d. Authorize an electrical transmission line across Sequoia National Park even though Congress has specifically required Congressional approval before any transmission line can be built in the park.

INTEREST OF AMICI CURIAE

All three amici curiae are major, national conservation organizations with deep and well-established interests in protecting America's great scenic resources. They are increasingly relying upon litigation as a principal means of carrying out their purposes.

The Wilderness Society is a nonprofit citizens' organization with approximately 70,000 members. It was organized in 1935 to obtain protection for the Nation's remaining wildlands, to carry on education programs concerning the wilderness, and to conserve our national resources.

Friends of the Earth is a nonprofit organization with 22,000 members and is dedicated to the preservation, restoration and rational use of the environment in the United States and throughout the world. It is particularly interested in preserving the world's natural ecosystems and remaining wild places.

The Izaak Walton League of America is a nonprofit organization with approximately 55,000 members. Its primary goal is restoring and maintaining the quality of the environment through the protection and wise use of our natural resources.

Both the petitioner and respondents have consented to the filing of this brief.

STATEMENT OF FACTS

The Forest Service of the Department of Agriculture began to make plans for the development of Mineral King in the 1940's (R. 43, 44, 47). In February 1965 the Forest Service issued a prospectus for recreational development of Mineral King (R. 26).

In December 1965, the proposal submitted by Walt Disney Productions, Inc., was selected by the Forest Service from the six bids received (R. 27). On January 10, 1966 (R. 27), the Forest Service granted Disney a three-year planning permit (R. 166, 176).

The Secretary of the Interior "with great reluctance" (R. 139; see R. 65, 136), on November 11, 1968, authorized the State to build a highway across Sequoia National Park to the resort to be constructed in Mineral King (R. 37, 136, 137). The actual permit has not been issued pending development and approval of a specific highway design (R. 182).

On January 21, 1969, the Forest Service approved the plan of Walt Disney Enterprises and stated that a thirty-year term permit for 80 acres and a revocable permit for additional land would be issued as soon as the State of California executed the first contract for construction of a significant portion of the new highway to Mineral King (R. 27-28, 166). In February 1969, a publication of the Forest Service entitled "Mineral King—A Planned Recreational Development" stated that "under an annual permit [Disney] will be permitted to construct lifts and trails throughout about 13,000 acres" (R. 31).

When the Sierra Club learned that the Secretaries of Agriculture and Interior were seriously considering a large development (R. 26, 41, 46), Dr. William E. Simm requested on June 7, 1965, on behalf of the Sierra Club Board of Directors, a hearing upon the proposed development (R. 26, 47). This

request was denied (R. 48). On August 7, 1965, a Sierra Club staff member, J. Michael McCloskey, reiterated the request for a hearing because of the special national characteristics of Mineral King and the size of the proposed development, the fact that Mineral King should be treated as primarily a game refuge, the opposition to the proposed development and the lack of any hearing since 1953, and the important questions of public policy involved (R. 41-44). This request and a subsequent request by telegram on November 3, 1965 (R. 46), were both denied (R. 26).

In view of the imminent start of construction of the resort and highway (R. 8, 184, 79), the Sierra Club brought suit in the United States District Court for the Northern District of California on June 5, 1969, seeking to enjoin defendants Hardin, Deinema, and James from taking any action toward implementation of the Disney development (R. 10) and defendants Hickel and McLaughlin from authorizing or approving design standards, rights of way, or construction of the proposed highway (R. 11).

The district court, upon the basis of affidavits from plaintiffs and defendants and after hearing two days of argument (R. 200), decided that there were substantial questions as to whether defendants had exceeded their statutory authority and that irreparable injury would result if an injunction were not issued (R. 199-200). The court therefore issued a preliminary injunction prohibiting defendants from granting any permits, rights-of-way or approvals of the Disney development or the highway across Sequoia National Park providing, however, that investigations, planning, surveys and explorations which did not interfere with the terrain could continue (R. 200-201).

The court of appeals reversed, holding that the Sierra Club did not have standing to sue (R. 213-224) and that the defendants had not exceeded their statutory authority (R. 224-234). The court vacated the preliminary injunction (R. 234) but stayed issuance of its mandate pending disposition of the petition for a writ of certiorari.

The Mineral King Area

The Sequoia National Game Refuge was created in 1926 encompassing the Mineral King Valley (R. 42). The refuge is a 15,000 acre portion of the Sequoia National Forest bounded upon three sides by Sequoia National Park (R. 26). Mineral King is described in the record as (R. 53a, 41-42):

> Unsurpassed in natural splendor, Mineral King is perhaps more similar to the European Alps than any other area in the United States. Altitudes range from the 7,900 foot valley to surrounding mountains that reach the 12,400 foot level. The High Sierra wonderland, located in Sequoia National Forest, is generously endowed with lakes, streams, cascades, caverns and matchless mountain vistas.
>
> * * * * *
>
> Although their scenic and ecological features are reminiscent of many other Sierra regions, Mineral King and environs are unique. They are unlike any other roadhead that we have ever visited. Where else in the Sierra does a primitive roadhead reach to the headwaters of a major river (east Fork of the Kaweah)? Where else does a road provide such direct access to so many alpine passes (five or more)? Yet the two mile long valley is essentially unspoiled. Mineral King's U-shaped basin is rimmed with 12,000 footpeaks rising 3,000 to 4,000 feet above the valley from whose flank streams, cascades, and torrents tumble into the narrow floor, which is mainly a flood plain and wash for the river. A number of lakes are within less than a two-hour walking distance of the valley, which is a trail center where at least seven routes radiating in all directions open up the southern part of Sequoia-Kings Canyon National Park, Sequoia National Forest, the magnificent Big Kern Sierra to the west, and the Little Kern territory below Forewell Gap. The massive self-contained ecological unit of Mineral King itself (protected in a National Game Refuge) and the surrounding country are one of the finest wilderness-type areas we have ever seen.

The Walt Disney Ski and Summer Resort

The solicitation to bid for the development of Mineral King called for bids for a facility including four ski lifts, parking for 1,200 automobiles, overnight accommodations for 100 skiers, and an estimated investment of 3 million dollars (R. 27). In contrast, Walt Disney Enterprises plans to build a year-round recreational facility. It will cover 13,000 (R. 31, 229-230) of the 15,000 acres (R. 26, 81) in the national game refuge. When fully developed, 1.7 million visitors are expected annually (R. 53a) and as many as 14,000 daily, which is nearly twice the concentration of visitors as in the Yosemite Valley (R. 28).

Walt Disney Enterprises plans initially to invest 35 million dollars to construct an alpine village with shops, theater, convention center, hospital, accommodations for 3,310 visitors, twenty-two lifts and gondolas, ten restaurants, an avalanche dam and stream control facilities, riding facilities with at least fifty horses, a five-story parking facility for 3,600 vehicles, and refuse and sewage facilities (R. 27, 31, 53a-53b, 126, 130-131, 134). The ski lifts, ski trails, parking facility, refuse and sewage disposal facilities and service roads will be on the land subject to the annual permits (R. 15, 23, 31, 191-192, 229-230).

The development will require "extensive bulldozing and blasting in most lower areas and extensive rock removal at high elevations" and the "grooming and manicuring" of most slopes (R. 32). There will be "a need for land modification, earth moving, and possibly stream channel changing beyond what we [the Forest Service] might normally permit" and "a great deal of earth and debris moving" (R. 128).

These are only present plans since a brochure of Walt Disney Productions says (R. 53a, 28):

> All of us promise that our efforts now and in the future will be dedicated to making Mineral King grow to meet the ever-increasing public need. I guess you might say that it won't ever be finished.

Numerous government officials have stated their strong concern about the effect of the development. Mr. J.C. Fraser, Chief Water Projects Branch, California Department of Fish and Game, has said in a letter (R. 30, 76):

> Your fourth question regards the potential effect of development in the Mineral King Game Refuge on game. This Department has not made specific studies nor prepared reports regarding the effects of this development on wildlife. We can say, however, that in an extensive development such as the Disney proposal, considerable wildlife habit would be lost and wildlife would suffer from human encroachment.

The Director of Wildlife Management of the Forest Service, W.O. Hansen, has expressed concern about the effects of the planned riding concession—"It appears that this could cause serious problems in sanitation and esthetics"; sewage disposal, "I would question whether the soil can adequately handle the effluent"; and check dams to collect debris, "What is the source of the debris? Will it result from timber cutting on the ski runs" (R. 126). He has said that "I would hope that we study the impacts of this concession for a long time before permitting another one" (R. 126).

Mr. R.M. DeNio, Director of Range Management of the Forest Service, has written: "To what degree has the compatibility of planned horse programs with resource needs been determined? The projected use by people, in itself, will have a very real impact on these fragile soils and vegetation without the additional effect of horse use" (R. 127). Mr. DeNio concluded, "There is a real need for basic consideration of soils and vegetation" (R. 127).

The Chief of the Forest Service Division of Recreation, Mr. W.S. Davis, has written to the Sequoia National Forest Supervisor (R. 34, 192):

> The impact is certain to be heaviest at the village site and on the valley floor. By accepting the development proposal we have also accepted that

> some effect on fishery values, streamflow, vegetation, soils, and other resources must be provided for.

The Range and Wildlife Management Section of the Forest Service stated in a memorandum to the Recreational Section of the Forest Service (R. 130):

> We have reviewed subject report [on Preliminary Site Studies Proposed Development of Mineral King] . . . .
>
> We feel the report is rather superficial, and the investigations it covers apparently very general and sketchy. Consequently we find many of the assumptions made and conclusions reached are inadequately founded and unacceptable.

After citing problems with streamflow release, channel diversions, and the "Valley Debris Dam" (R. 130), the Range and Wildlife Section concluded (R. 131):

> The total basic concept of development appears badly biased in orientation toward a highly artificial, continued situation, without any real attention to ecological factors and needs to multiple use management. The extent and nature of alterations of the basin is unacceptable to us—the damages extend beyond effects on fish and wildlife, and these alone are critical.
>
> Specifically, stream diversion and channel treatment, flood and debris control, surface water supply development, and sewage disposal proposals are all of a nature we find severely damaging or unacceptable.
>
> It is recognized that development of high intensity year-round recreational use in this restricted fragile sub-alpine area is bound to result in pronounced impacts and certain unavoidable changes.

The Highway Across Sequoia National Park

Mineral King is now reached by a road running from Three Rivers, California, and across part of Sequoia National Park (R. 60, 63). It is a low standard road constructed to support the mining activities of the 1870's (R. 28). The road is approximately 25 miles long and according to the

California Division of Highways, "consisting of extremely substandard alignment and grades. There are a number of switchbacks with radii of less than 50 feet" (R. 60). A study done for the Park Service by the Clarkeson Engineering Company says that "it is a widened trail which winds up the mountain, has grades in excess of 15% [and] is narrower than two lanes in many areas" (R. 144). "Most of the surface is oiled dirt with several sections consisting of only a graded roadbed" and it now has an average of only 95 cars daily (R. 60).

The California Division of Highways estimates that by 1978 the traffic to the Disney resort will have an average daily volume of 4,550 vehicles, with the average daily volume during the peak summer months being 9,850 vehicles (R. 60). The present road is not adequate to accommodate the anticipated traffic load (R. 79, 144). Consequently, the permits to construct the resort at Mineral King were contingent upon the construction of an all-weather high-speed highway from State Highway 198 to Mineral King (R. 161, 167, 187). The highway is designed to serve Mineral King rather than Sequoia National Park (R. 54, 58, 140, 143, 194) since there are no plans to develop the area of the park through which the highway passes (R. 36).

The State of California has authorized the construction of the new highway with state highway funds (R. 140, 161). The central portion of the road will cross a six-mile width section of Sequoia National Park but, due to the terrain of the area, 9.2 miles of road will be needed (R. 54, 62-63, 65, 161). The highway will require "extensive cutting and filling accompanied by extreme back slopes and embankment slopes to accomplish a steady earthwork condition" (R. 150). The roadbed itself will be 28 feet across but in some areas the embankment slopes will extend 800 to 1,000 feet across (R. 148).

The California Division of Highways has stated that the new road will be almost entirely different from the old (R. 61):

> Several corridors were initially considered but based on reconnaissance studies, it was concluded that feasible development of an all-weather highway to Mineral King is possible only in the corridor of the east fork of the Kaweah River. The existing country road to Mineral King generally parallels this water course; however, very little of the existing roadbed can be incorporated into the proposed all-weather highway.

Although the Park Service's consultant, the Clarkeson Engineering Company, proposed a route that would incorporate "approximately two-thirds of the old road" (R. 145), the Park Service chose the Division of Highway's route instead of Clarkeson's (R. 138).

The highway is planned as two lanes with extra safety lanes for passing at frequent intervals (R. 54, 61). The passing lanes are the subject of a dispute between the Park Service, on the one hand, and the Forest Service and California Division of Highways, on the other. The latter two agencies favor passing lanes so that vehicles would have to wait no more than five minutes in a queue without an opportunity to pass and that peak capacity would be 1,200 cars per hour in one direction (R. 39, 61, 79). The Park Service objects to the passing lanes in Sequoia National Park and questions whether 850 cars per hour in one direction can be adequately accommodated on the proposed highway even with the passing lanes (R. 136-138, 155-157).

The Park Service fears it will be pressured to permit expansion of the road to four lanes (R. 136-137). Secretary of the Interior Udall wrote Secretary of Agriculture Freeman in 1968 that (R. 136):

> In addition to our desire to minimize the damage to park values of the road, we are concerned about what we have been told concerning the size of the planned Disney development. Will one two-lane road of park standards be adequate or will Interior later receive a request for another road?

John Clarkeson, a consultant to the Park Service, has stated that "[u]nless some control or other is considered, this two-lane road does not look at all adequate for a 14,000 a-day-visitor load when so many will be one-day visitors" (R. 157).

Clarkeson also concluded (R. 142-143):

> [T]he road, if primarily based on cut and fill construction [instead of following the terrain as the existing road does] would be a barrier to wildlife and visitor movements throughout this area of the park. Animals and men would have to cross the road to the risk not only of such persons and wildlife, but also to users of the highway.
>
> Among the wildlife species of this area are deer, wolf, mountain lions, beaver, bear and big horn sheep. The retention and control of these species would be affected if relatively free movement up and down their slopes was not maintained.

The Park Service has also expressed fears about the impact of the road upon the floor of the park, especially upon the sequoia trees (R. 62, 67). The California Division of Highways therefore hired Dr. Richard Hartesveldt to assess the impact of the proposed road (R. 62, 67). He found that 45 sequoias "are in a position of possible jeopardy because of road construction" (R. 85, 123).

The Secretary of Interior originally was extremely reluctant to approve the highway across Sequoia National Park and urged that an alternative be explored (R. 65, 136, 139). The California Division of Highways studied two alternatives, but found them too expensive (R. 66). Secretary Udall later acquiesced and gave permission for the highway based on the assurance that protection of the park would be given adequate consideration (R. 62-63, 137-139).

The Electrical Transmission Line Across Sequoia National Park.

A 66,000 volt power line across Sequoia National Park to Mineral King is planned in order to serve the power needs of the resort (R. 40). The line will generally follow the pro-

posed road alignment (R. 40) and will therefore cross about 9.2 miles of park land (R. 65).

SUMMARY OF ARGUMENT

I

Plaintiff, the Sierra Club, has standing if "the challenged action has caused [it] injury in fact, economic or otherwise" and if "the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute" *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152, 153 (1970).

A. There can be no doubt that the Sierra Club satisfies the second requirement. The statutes upon which plaintiff relies were designed to protect Sequoia National Game Refuge, Forest, or Park. For example, 16 U.S.C. 688 allows the Secretary of Agriculture to permit use of lands in the game refuge only "so far as they may be consistent with the purposes" of the refuge "to protect from trespass the public lands of the United States and the game animals which may be thereon." Since plaintiff is a conservation organization attempting to protect the wildlife, scenery, trees, and other aspects of the refuge, forest and park, its interests are within the zone of interests protected by the statutes.

B. The injury required for standing requires "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). The plaintiff's interest "may reflect 'aesthetic, conservational, and recreational' as well as economic values." *Association of Data Processing Service Organization, Inc. v. Camp, supra*, 397 U.S. at 154. The Sierra Club has suffered injury of the kind which gives

it a personal stake in this controversy and which assures concrete adverseness.

1. First, the Sierra Club has standing as a national conservation organization interested in protecting the environment. The Sierra Club has a long history of attempts to protect the environment. It is today one of the largest conservation organizations in the country and is currently involved in 38 major suits all over the country. Ever since 1965 when it first sought a public hearing, it has been opposing the development of Mineral King. Since the plaintiff obviously has the concrete adverseness needed to sharpen the issues far more even than an ordinary individual plaintiff, the constitutional requirements of a "case" or "controversy" are fully met.

Recognition of the standing of a national conservation organization is also consistent with the non-constitutional policy considerations which the courts have recognized in considering standing. There is no indication that the handful of cases which can be brought by national conservation organizations will overburden the courts. Since these organizations often have a broader outlook, they may be more careful in bringing actions and may thereby often lighten the burden of the courts by not bringing less well prepared or meritorious actions.

The courts have often considered whether there was anyone else with a better claim to standing than the plaintiff. While, in this case, local users of the area could bring suit, in many conservation cases this situation does not exist. There is frequently no present use (such as a suit to preserve the wilderness) or no use is possible (such as a suit to protect eagles). Even where there are users, they may be unwilling to sue such as nearby residents who desire the development of an area because of the economic benefit which will result. Yet, the national game refuges, forests, and parks must be preserved even if local residents desire to develop them. National conservation organizations should have standing to sue to protect these areas which Congress reserved for the benefit of the entire country.

The standing of national conservation organizations is further supported by federal statutes and judicial decisions. The Administrative Procedure Act has been repeatedly construed by this Court and lower federal courts to expand both the concepts of standing and reviewability. The National Environmental Policy Act declares, as the policy of this country, the protection of the environment. The President's Council on Environmental Quality which is charged with enforcing the Act, has concluded:

> Where an organization or group of citizens devoted to or with a demonstrated interest in environmental protection asserts a claim against an agency of the Government in reliance on the provisions of the National Environmental Policy Act, or of other legislation designed to protect the environment, the interposition of the Government of the defense if lack of standing is inconsistent with the federal environmental policy, as exemplified in the National Environmental Policy Act and in other legislation.

And the Ninth Circuit position is inconsistent with that of every other circuit and district court which has considered the issue.

2. Second, the Sierra Club has standing as a local conservation organization particularly interested in protecting Sequoia National Game Refuge, Forest, and Park. Numerous decisions, including that of the court below, recognize the standing of local conservation organizations. While the court of appeals did not find the Sierra Club to be such an organization, it is clear that the Sierra Club is both a national organization and a local organization with particular interest in the Sierra Nevada Mountains. Its headquarters is in San Francisco and 27,000 of its 78,000 members live in that area. John Muir and the Sierra Club were in large measure responsible for the creation of Sequoia National Park, its enlargement, and establishment of the game refuge. The Sierra Club's opposition over the last six years to development of Mineral King is a continuation of this activity.

3. Third, the Sierra Club has standing to represent the interests of its members in protecting lands in national game refuges, forests, and parks. The federal courts have held that such lands are held in trust for all the American people. *E.g., Utah Power and Light Co. v. United States,* 243 U.S. 389, 409 (1917). When a trustee does not defend the trust property, the beneficiary is entitled to bring suit to protect his interests. *Restatement of Trusts,* Sec. 282. All American citizens therefore have the right to sue to prevent despoilment of lands held in trust for them.

This Court has held that organizations can bring suit "as proper representatives of the interests of their members." *National Motor Freight Traffic Ass'n v. United States,* 372 U.S. 246, 247 (1963). The district court found that the Sierra Club was "regularly serving as a responsible representative" of persons interested in conservation. It therefore had standing to represent the interest of its members in protecting their rights in the invaluable land held in trust for them.

4. Fourth, numerous courts, including the court below, recognize the standing of users of an area for one to protect it. The Sierra Club itself is a user of the refuge and park since it runs a camping trip into the area yearly. Many of its members are also users and, as we have seen, the Sierra Club has standing to represent their interests.

II

The court of appeals erred in reversing the grant of a preliminary injunction by the district court. The district court has broad discretion to issue a preliminary injunction and an appeliate court will not normally reverse without a clear showing of an abuse of discretion. Here, the district court properly exercised its discretion.

A. The court of appeals held that a preliminary injunction can issue only upon a strong likelihood or reasonable certainty that the plaintiff will prevail on the merits. The

overwhelming majority of decisions of both this Court and the courts of appeals require only that plaintiff raise a serious or substantial question. While a minority of decisions require a strong likelihood or reasonable certainly that the plaintiff will prevail, most of these cases involve situations where no irreparable injury was threatened. Here, therefore, the district court properly issued the injunction because substantial and serious questions were raised.

B. The court of appeals plainly erred in finding that no irreparable injury was threatened. This is the classic case where an injunction is required to maintain the status quo pending determination of the merits. If the injunction had not been issued, construction of the highway and resort would have begun with serious harm to the national game refuge, forest, and park. On the other hand, the only harm to defendants and the interests they represent from the preliminary injunction is the delay from not being able to start construction immediately. The district court properly found that the balance of harm favored the issuance of the preliminary injunction.

III

If this Court holds that the district court's issuance of the preliminary injunction was proper, it is clear that the court of appeals' determination on the merits is not binding on remand. Nevertheless, since the court of appeals in effect decided the merits, it is likely that its views will prevail on remand either by influencing the district court or by forming the basis of a new decision on appeal. In view of the fact that this Court has granted certiorari on the merits and the legal issues have already been considered by the courts below, we urge this Court to consider the legal issues in order to give appropriate guidance to the district court on remand.

Article IV, Section 3, clause 2 of the Constitution gives Congress exclusive authority over the disposition of federal

land. The executive agencies have no power to dispose of land except insofar as they receive authority from Congress. Defendants must therefore demonstrate clearly their authority in permitting construction of the resort, highway, and transmission line.

A. The Secretary of Agriculture has no authority to issue either a term permit or revocable permit which will convert Sequoia National Game Refuge into a ski and summer resort. Congress has provided in 16 U.S.C. 688 that all uses of the refuge shall be consistent with its purpose "to protect from trespass the public lands of the United States and game animals which may be thereon . . . ." The refuge was created for the purpose of protecting the deer and other animals which make Mineral King and surrounding areas their home. The Forest Service promised, in supporting creation of the refuge, that even "grazing ought to be excluded from the game refuge area . . . ." Testimony of Chief Forester Greeley, Hearings on H.R. 9387 before the House Committee on Agriculture, April 7, 8 and 10, 1926, 69th Cong., 1st Sess. 57-58.

The permit to allow construction of the resort in Mineral King violates the language and purpose of Section 688. It would mean that 13,000 of the 15,000 acres in the refuge would be used for the resort. As many as 14,000 visitors and 4,550 automobiles a day would come to the area. There would be accommodations for 3,310 visitors, 22 ski lifts, 10 restaurants, and numerous other facilities. And there will be bulldozing, blasting, and manicuring of slopes throughout the area.

B. The Secretary of Agriculture has no authority to permit construction of a resort on 13,000 acres of a national forest.

1. The granting of a so-called revocable permit for 13,000 acres is an attempt to circumvent 16 U.S.C. 497 which allows the Secretary to grant 30-year term permits for 80 acres for resorts. Congress increased the acreage limitation from 5 to 80 acres in 1956 specifically because major resort

activities, including ski lifts, could not be encompassed within 5 acres. The Secretary cannot now ignore the acreage limitation simply by calling the permit for major, permanent facilities revocable.

2. 16 U.S.C. 551, upon which the court of appeals relied in upholding the Secretary, allows him only to make rules and regulations to protect the forests. This Court has held that it gives authority only over matters of "administrative detail." *United States v. Grimaud*, 220 U.S. 506, 516 (1911). Congress, judicial decisions, and opinions of the Attorney General (with only one exception) have made clear that a special statute was needed to permit construction of railroads and electrical and telegraph lines across national forest lands and that Section 551 did not give this authority. It therefore follows *a fortiori* that the Secretary has no authority to permit construction of a major resort.

Defendants rely on administrative practice and a single sentence from a recent Congressional committee report. However, administrative practice cannot be relied upon here because it was not contemporaneous with passage of Section 551, has not been consistent, and has not even been embodied in any regulation or written policy. While Congress has been informed that the Forest Service issues revocable permits, it has been told, as the Forest Service Manual states, that this is only for temporary uses.

3. The Secretary also has no inherent authority to issue the permit in this case. While numerous opinions of the Attorney General establish that federal officials can give revocable licenses for the construction of railroads, sewers and similar facilities across federal lands, the permit here is not revocable. It cannot be revoked in the full discretion of the Secretary since the permit for the 13,000 acres contemplates that it will last as long as the 30-year term permit for 80 acres; since administrative and probably judicial review would be available to the developer if revocation were attempted; since major structures are to be built which in fact are intended to remain; and since the land cannot be

restored, even if the structures were removed, to its previous condition.

C. The Secretary of Interior has no authority to allow a major highway to be constructed across Sequoia National Park.

1. Congress has made clear that the purpose of the national parks in general and Sequoia National Park in particular is to provide enjoyment by the public of the parks and to protect the trees, beauty and other natural characteristics. 16 U.S.C. 1, 20, 43, 45b, 61. When Congress enlarged the park in 1926, the sponsor of the bill stated that it would be retained as a trail park and that roads would not be built through it. 67 Cong. Rec. 19143.

The proposed road is an entirely new, high-speed highway. It will carry an average of 4,550 automobiles a day, will be often three lanes wide, and will have embankments up to 800 to 1000 feet across. It threatens the free movement of wildlife and at least 45 giant sequoias. It is therefore inconsistent with the intent of Congress in enlarging and protecting the park.

2. Congress has also made clear that the park land is to be used for the enjoyment by the public of the park itself. 16 U.S.C. 1, 466. All park facilities and service must serve visitors to the park. 16 U.S.C. 20, 3. Congress has stated, in creating another national park, that the Secretary of Interior does not have the function of building highways through the park to serve non-park purposes and the Department of Interior has itself issued Park Road Standards stating that park roads should not be built for such purposes. The proposed highway cannot be authorized because it is designed to connect a state highway with the commercial resort in Mineral King and not to serve the park.

D. 1. 16 U.S.C. 45c specifically prohibits the Secretary of Interior from allowing an electrical transmission line to be constructed across Sequoia National Park without the approval of Congress. While the principal purpose of the

provision was to cover hydroelectric projects, the statute explicitly went further. This Court has often held that federal statutes are to be construed according to the plain meaning of their language.

2. The electrical line may also not be constructed because it serves only a non-park purpose. Since it is intended to serve a commercial resort, it may not be built across Sequoia National Park for the same reasons a highway cannot be built for a non-park purpose.

ARGUMENT

Introduction

1. *Description of the Area*

The area which is subject to this suit is commonly called Mineral King. It is part of both the Sequoia National Game Refuge and of Sequoia National Forest. Mineral King is not only virtually surrounded, as the map on the next page shows, by Sequoia National Park but is integrally related to the park in terms of topography and nature.

Mineral King is much more than just a "unique combination of eight alpine bowls" as it is described in the Forest Service Fact Sheet which attempts to justify turning it into a ski resort.[1] It "is a two-mile-long valley rimmed by cliffs and cirques from which streams and freshets explode and cascade and tumble. It is a spot that has known the mark of man for nearly a hundred years and yet it is still unspoiled. The wild rugged beauty still exists as it must have been when the first prospectors poked into the deep ranges in the

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[1] *Mineral King—A Planned Recreation Development,* Forest Service, U.S. Department of Agriculture, February, 1969, p. 1.

1870's."[2] As John White, retired superintendent of Sequoia National Park described the Sequoia Park and Forest area:[3]

> Down the canyons rush the rivers, in full spate from May to July or August, in quieter mood at other seasons, fed by innumerable creeks that issue from mountain meadows and lakes. Above the rivers rise the cliffs and domes, John Muir's 'granite headlands,' jutting out toward the San Joaquin Valley to the West. From these cliffs tumble water falls and cascades, their spray misting the hanging gardens of flowers which paint the slopes from early summer until late autumn. The Pride of the Mountains, the scarlet pentstemon, persists through the earliest frosts to make sanguineous patches through the first snows of winter. In the upper canyons are lakes, azure and emerald gems, framed in a glacier-polished setting.
>
> The High Sierra Cordon of impenetrable peaks holds fast those hidden treasures that are the hikers' and packers' rewards—meadows green with short-hair grass or with sedges and flowers on the banks of meandering brooks; little hidden yosemites where the only sound from a mechanized world is the occasional drone of an airplane thousands of feet overhead but little more disturbing than the flight of hawk or eagle; innumerable fishing streams and lakes with camping sites beloved by the Sierra Club or by individual outfits; a paradisiacal land.

The game refuge is the home of the Mountain Bluebird, the Yellow Hawk, the Western Robin, the Golden Eagle and other birds and of such animals as the American Black Bear, Mule Deer, Mountain Lion, Sierra Beaver, California Grey Fox and California Wildcat.

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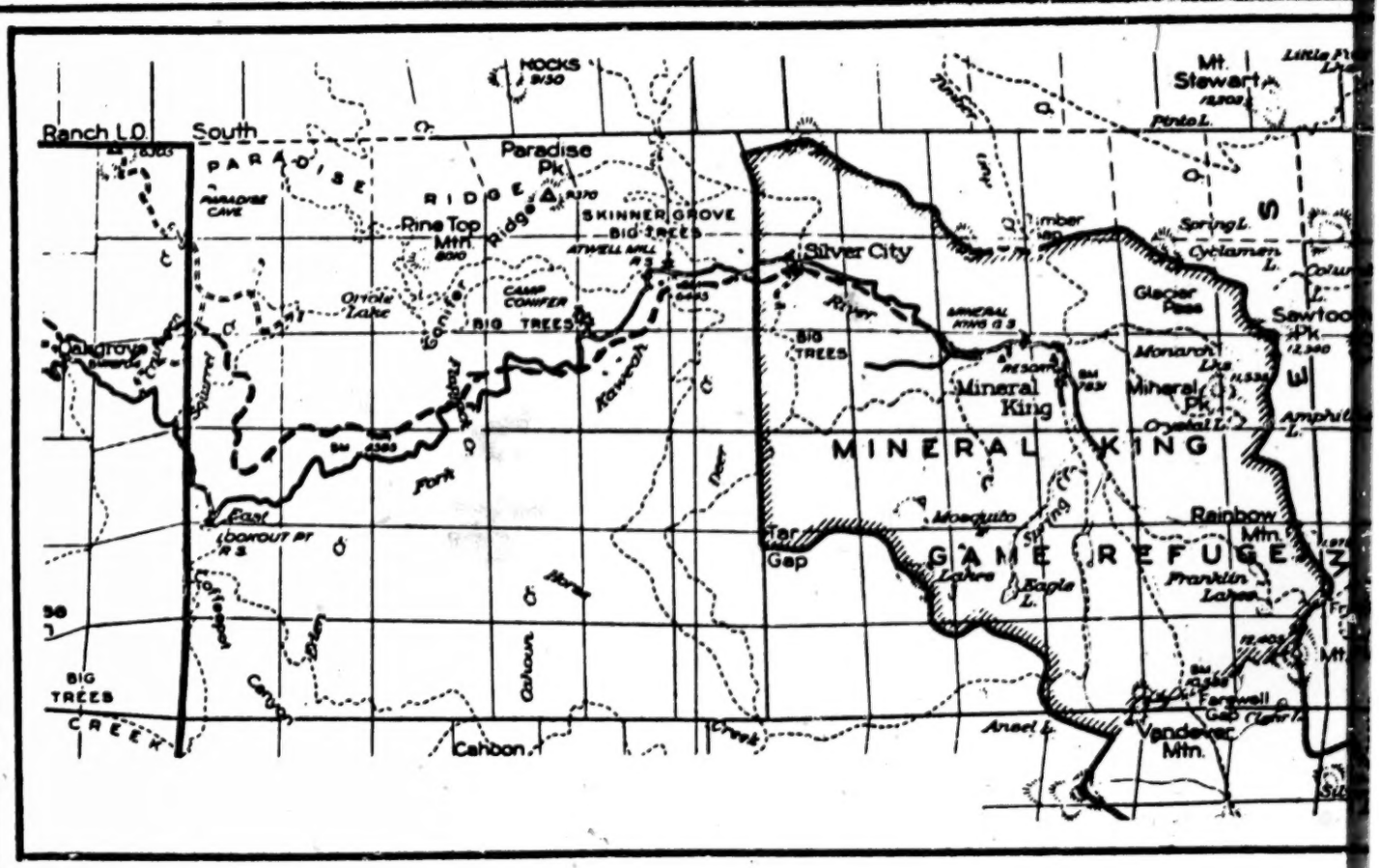
[2] Leadabrook, Russ, *A Guidebook to the Southern Sierra Navada Including Sequoia National Forest,* Los Angeles, California, 1968, p. 19.

[3] White, John and Pusateri, Samuel, *Sequoia and Kings Canyon National Parks,* Palo Alto, California, 1949, p. 35.



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LEGEND

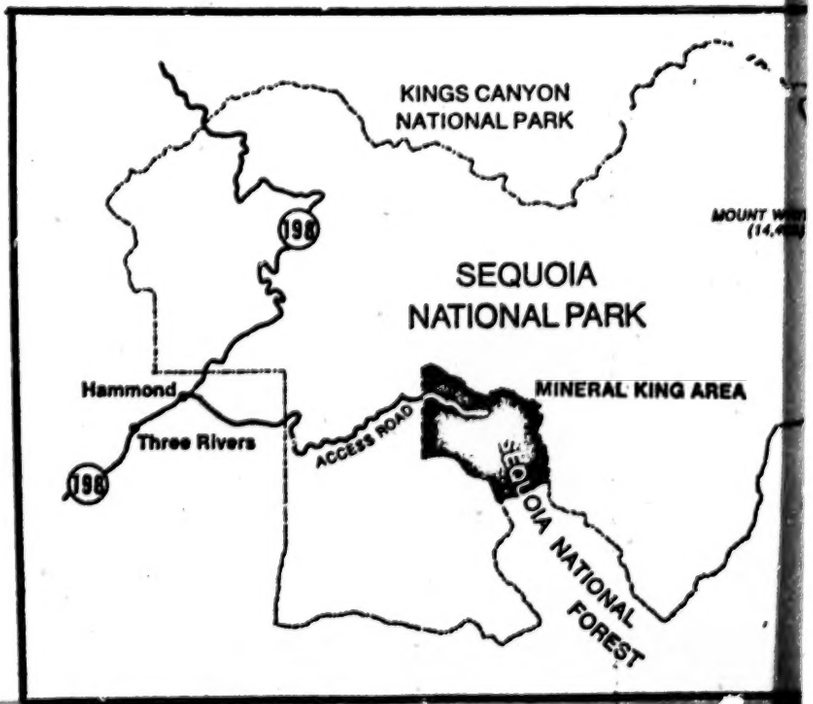
Sequoia National Park

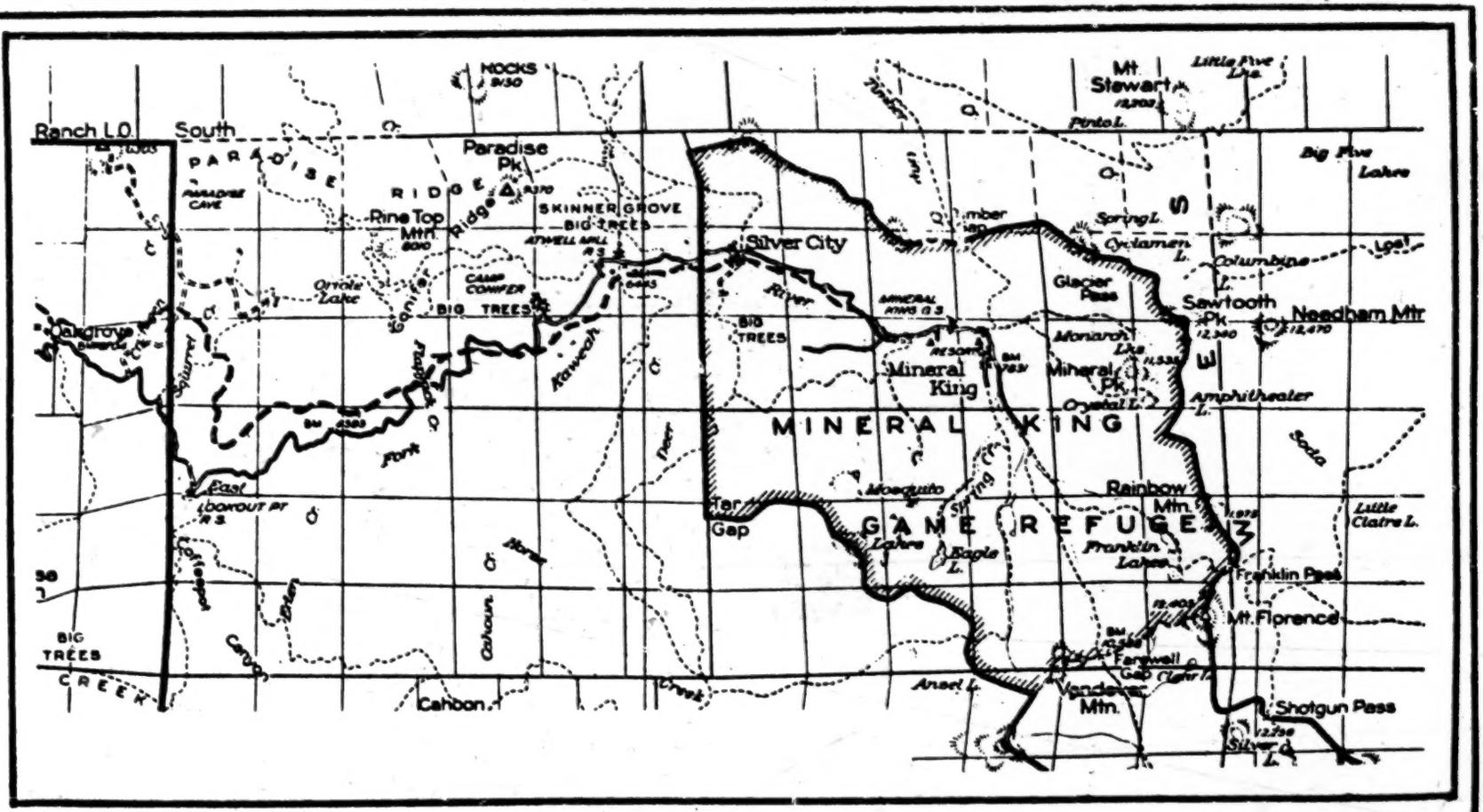
Mineral King

Roads:

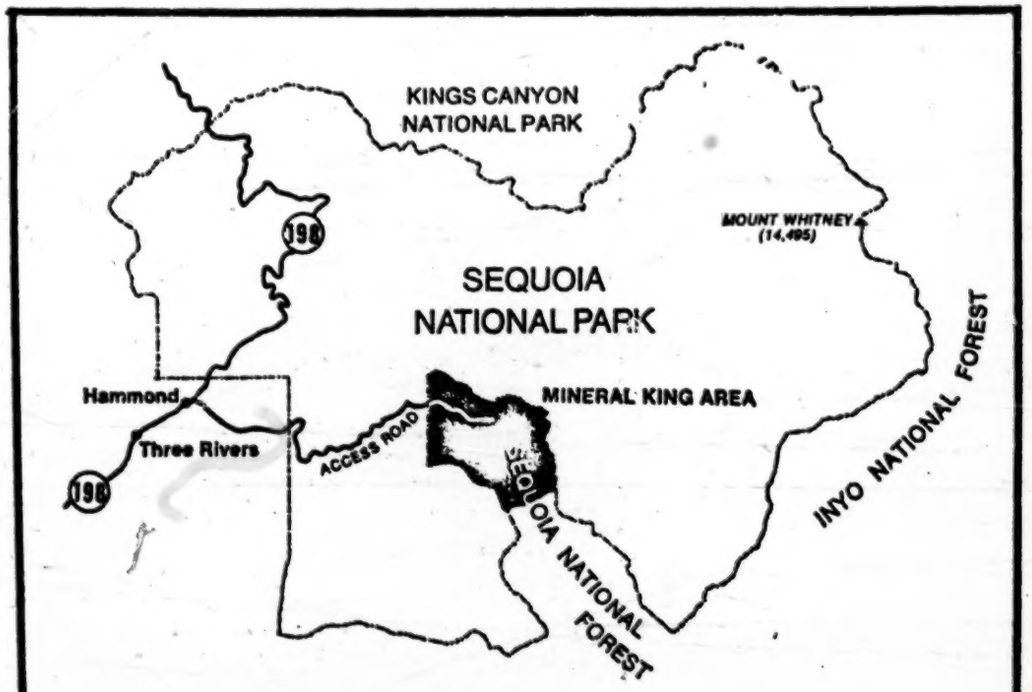
proposed

existing




Ranch L.O.
South
Paradise Pk.
PARADISE RIDGE
Pine Top Mtn.
SKINNER GROVE
BIG TREES
Silver City
Mineral King
MINERAL KING
GAME REFUGE 3
Rainbow Mtn.
Sawtooth Pk.
Needham Mtn.
Mt. Florence
Franklin Pass
Shotgun Pass
Vandever Mtn.
Mt. Stewart
Big Five Lakes
Amphitheater L.
Little Claire L.
Oakgrove
Cahoon
BIG TREES CREEK


San Francisco
SIERRA NEVADA RANGE
CALIFORNIA
SEQUOIA NATIONAL PARK
AREA OF DETAIL MAP
MINERAL KING
Los Angeles


KINGS CANYON NATIONAL PARK
MOUNT WHITNEY (14,495)
SEQUOIA NATIONAL PARK
MINERAL KING AREA
Hammond
Three Rivers
ACCESS ROAD
198
SEQUOIA NATIONAL FOREST
INYO NATIONAL FOREST

The magnificence of the area is best described, however, not in these words but through pictures, several of which we have included as an appendix to this brief.

2. *History of Mineral King*

The Mineral King Valley did not feel the influence of man until the early 1870's when miners came in search of gold and silver. They found enough minerals for the area to have its name changed from Beulah to Mineral King. However, they did not find enough to support large commercial operations and by 1879 most mine owners had decided to leave the area.[4]

John Muir began in 1873 exploring the Kings Canyon and Sequoia areas. He persuaded Senator John F. Miller of California to introduce a bill in 1881 (S. 463, 47th Cong., 1st Sess.) which would have set apart "a public park and forest reservation for the benefit and enjoyment of the people."[5] The bill, which included not only Mineral King but all the areas now within Sequoia, Kings Canyon, and Yosemite National Parks, died in the Senate Public Lands Committee.[6]

In 1890, bills were introduced to establish Sequoia, General Grant, and Yosemite National Parks. These bills passed the Congress and became law. 26 Stat. 478, 651.

In 1891, John Muir turned his efforts to the enlargement of Sequoia National Park. He wrote an article entitled "A Rival of the Yosemite"[7] advocating an expansion of Sequoia which would have included Mineral King:

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[4]Leadabrook, *A Guidebook in the Southern Sierra Nevada Including Sequoia National Park, supra,* p. 22.

[5]Wolfe, Zinnie Marsh, *Son of the Wilderness: The Life of John Muir,* N.Y. 1945, p. 228.

[6]*Ibid.*

[7]*Century Magazine,* November, 1891.

> This region contains no mines of consequence, it is too high and too rocky for agriculture, and even the lumber industry need suffer no unreasonable restriction. Let our law-givers then make haste, before it is too late, to save this surpassingly glorious region for the recreation and well-being of humanity, and the world will rise up and call them blessed.

The following year, on May 28, 1892, John Muir met with a small group in San Francisco where together they started the Sierra Club. The Club was formally organized on June 4, 1892, with its purpose as stated in the "Articles of Incorporation": "To explore, enjoy and render accessible the mountain regions of the Pacific Coast; to publish authentic information concerning them; to enlist the support and cooperation of the people and the government in preserving the forests and other natural features of the Sierra Nevada Mountains."[8]

Meanwhile, on March 3, 1891, Congress enacted a bill granting the President authority to establish national forests on government-owned land. 26 Stat. 1103, 16 U.S.C. 471. President Harrison in 1893 created, pursuant to 16 U.S.C. 471, the Sierra Forest Reserve which included most of the area around the three parks including Mineral King. However, John Muir wrote in 1898:[9]

> This Sierra Reserve, proclaimed by the President of the United States in September, 1893, is worth the most thoughtful care of the government for its own sake, without considering its value as the fountain of rivers on which the fertility of the great San Joaquin Valley depends. Yet it gets no care at all. In the fog of tariff, silver, and annexation policies it is left wholly unguarded.

On February 1, 1905, a statute was passed, 33 Stat. 628, which moved administration of the national forests from the

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[8] *Sierra Club Handbook*, p. 60 (1969).

[9] *Atlantic Monthly*, January 1898, p. 27.

Department of the Interior, specifically the General Land Office, to the Department of Agriculture, which already had a Bureau of Forestry. This Bureau, which formerly had only an advisory role concerning national forests, became the Forest Service with complete administrative responsibility. The Sierra Forest Reserve was divided into national forests and the southern portion, including Mineral King, became Sequoia National Forest.[10]

The Sierra Club continued its efforts to enlarge Sequoia National Park to include Mineral King and other areas by writing in 1907 a report to the President, the Secretary of Agriculture, and the Chief Forester. Shortly thereafter, William E. Colby of the Sierra Club collaborated with Robert E. Marshall, the Chief Geographer of the United States Geological Survey, to produce a proposal for a much larger Sequoia National Park which included Mineral King.[11] In 1911, this proposal was introduced as a bill by Senator Frank P. Flint. S. 10895, 61st Cong., 3rd Sess. The bill was opposed, however, by Chief Forester Henry S. Graves on the ground that a national park service should be established before the creation of any new parks.[12]

In 1916, the National Park Service was established (39 Stat. 535, 16 U.S.C. 1) and a new bill was introduced to enlarge the park including Mineral King (H.R. 13168, 64th Cong., 1st Sess.). The Park Service and Forest Service argued throughout this period concerning which lands should and should not be in the park. The Forest Service objected to the inclusion of mineral and merchantable timber lands.[13]

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[10]Farquhar, Francis P., "Legislative History of Sequoia and Kings Canyon National Parks" *26 Sierra Club Bulletin* 42, 45 (1941).

[11]Strong, Douglas Hillman, *Trees or Timber: The Story of Sequoia and Kings Canyon National Parks,* Sequoia Natural History Association, 1964, pp. 41-43.

[12]Farquhar, "Legislative History of Sequoia and Kings Canyon National Parks," *supra,* p. 46.

[13]Strong, *Trees or Timber, supra,* p. 44.

Hearings were held on several occasions concerning enlargement of the park. At the hearings before the House Committee on Public Lands in 1919, Steven T. Mather, the Director of the National Park Service stated, "This bill was endorsed by the Sierra Club of California over five years ago. . . . It will . . . take in the great scenic country behind the present Sequoia Park." Hearings on H.R. 10929, January 21, 1919, 65th Cong., 3d Sess. 69. Mr. Mather went on to state that, in naming the enlarged park, the proposal of dedicating it to the president of the Sierra Club, John Muir, was considered but it was felt that Muir Woods and Muir Pass was sufficient use of the name Muir. *Id.* at 10. E.O. McCormick, then Vice-President of the Southern Pacific Railway, told the same committee that "I can remember when the country in question was almost inaccessible and [there was] only one map in existence—one hand-made map, the work of Mr. Joe Le Conte," who was one of the earliest members of the Sierra Club. *Id.* at 22.

The day after those hearings, the Boston *Evening Transcript* printed a long article favoring the passage of the bill. This article pointed out (January 22, 1919, pt. 2, p. 4):

> In later years California has bred a group of mountain rovers through the leadership of John Muir and the Sierra Club, whose president he was until his death, the members of which have explored the remotest sections of the high country and brought out tales of its superlative worthwhileness that have reached the ears of mountain-lovers the world over. It was these men and women who found and told of the glories of the mountainous regions to the east and north of the Sequoia and Grant Parks. They picked up and followed the disused trails of the old prospectors and forced a way where no trails existed. They found it a joyous place for spending a summer holiday, and saw in it the possibilities for making it a recreation ground for thousands where at most only dozens go today. And so began the agitation for extending the park boundaries to include the neighboring peaks and canyons.

The following year, H.R. 5006 was introduced which also would have included Mineral King in the park. 66th Cong., 2 Sess. At the hearings on the bill, Mr. Mather said, "I might state right here that the Sierra Club originally suggested that this proposed park in the boundaries as laid out there a considerable time before we took the question up in the Interior Department of the creation of the park." Hearings before the House Committee on Public Lands on H.R. 5006, February 24-26, 1920, 66th Cong., 2d Sess. 11. He then introduced Marian R. Parsons who was representing the Sierra Club. She inserted a letter into the record which stated (*ibid.*):

> At a special meeting of the directors of the Sierra Club last Monday, February 3, [1920,] the boundaries of the proposed Roosevelt National Park [the enlarged Sequoia National Park] were once more carefully considered and it was the unanimous opinion, concurred in by our special committee on national parks, that the boundaries should stand substantially as originally drawn by us. The southern boundary [which included Mineral King] also should, for scenic as well as administrative reasons remain substantially as originally outlined.

The Sierra Club's position regarding Mineral King was supported the next day of the hearings by H.M. Albright who was representing the Director of the Park Service (*id.* at 68-69):

> First, I would like to make a point clear that has not been emphasized and that is that the National Park Service did not originally outline those purple boundary lines [the boundary lines which included Mineral King]. They were drawn, years before the Park Service was created, by the Sierra Club and with the advice of John Muir, whom we all know to have been one of the greatest naturalists of his time. John Muir traveled over this country from the early days of California up to the time of his death. At various times he brought up the question of having a park established, and I think these lines were first

> drawn about 1911. . . . So this line, as I say, was drawn by those people who undoubtedly knew the mountains better than anybody else. The Sierra Club members probably know that area better now than any other living people. They go in there nearly every year, a Club of about 2,000 members, and they know every nook and corner of it; they know it better than even the Park Service does. . . . We would still feel like adhering to the boundary lines as drawn because these people have studied so much more thoroughly.

As regards Mineral King, Albright said (*id.* at 74-75):

> If this cut should be made here, taking out the Mineral King region, Franklin Pass and Farewell Gap, all of our means of access to the Kern region would be cut off. The Mineral King Valley is a natural course of roads or trails to the Kern. . . . That is all eliminated [by a Forest Service proposed cut] taking some of the most scenic parts of the park . . . so this southern region here gentlemen, ought to be included in the park by all means.

The Forest Service insisted that Mineral King be excluded from the proposed enlargement of the park. The sole reason for this insistence was that Chief Forester Graves felt that the mining activity around Mineral King should not be under the jurisdiction of the Park Service. He stated that "I have drawn the lines to exclude the mining camp of Mineral King. I do not think it should be in a park. . . . One of the differences between the national park and the national forest is the fact that the national forest is open to acquisition by private ownership under the mineral-land law. My own feeling is that this class of authority should not apply to national parks." *Id.* at 38. Due to this and other objections, all the bills to enlarge the park failed to pass.

In 1921, the head of the Park Service, Steven T. Mather, and the Chief Forester, William Greely, agreed that the Mount Whitney area would be included in the park but three southern townships, then within the existing park,

would be excluded.[14] This agreement was embodied in H.R. 7452, 67th Cong., 2d Sess., which, however, was defeated.

In response to the proposal to exclude the three southern townships, the Sierra Club suggested that the area be made a game preserve.[15] In May 1923, a meeting was held between the Forest Service, the Park Service, and the Sierra Club. At this meeting, it was agreed that Mineral King would be left out of the park but the Sierra Club again suggested that it should at least become a game refuge.[16] The Chief Forester agreed and that same year a bill was introduced that embodied this agreement. H.R. 4095, 68th Cong., 1st Sess. However, that bill also failed to pass.

Finally, in 1926, H.R. 9387 passed Congress and the Sierra Club achieved its goal of enlarging Sequoia National Park and preserving Mineral King as the Sequoia National Game Refuge. 44 Stat. 821, 16 U.S.C. 688. The House Report acknowledged the battle and victory of the Sierra Club stating, "This project embodied the ideas of John Muir, Professor Joseph Le Conte, and other prominent western men belonging to the Sierra Club of California, who had been in many years of intimate contact with the High Sierra." H. Rep. No. 902, 69th Cong., 1st Sess. 3.

I

THE SIERRA CLUB HAS STANDING TO BRING THIS ACTION

The complaint filed by the Sierra Club stated that the Sierra Club had approximately 78,000 members, of whom approximately 27,000 lived in the San Francisco Bay area (R. 4). It then alleged (R. 4):

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[14]Strong, *Trees or Timber, supra*, p. 44.

[15]11 *Sierra Club Bulletin* 324.

[16]Strong, *Trees or Timber, supra*, p. 44.

> For many years the SIERRA CLUB by its activities and conduct has exhibited a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country, regularly serving as a responsible representative of persons similarly interested. One of the principal purposes of the SIERRA CLUB is to protect and conserve the natural resources of the Sierra Nevada mountains. Its interests would be vitally affected by the acts hereinafter described and would be aggrieved as hereinafter more fully appears.

The district court held that these allegations gave the Sierra Club standing to bring the action (R. 197). The court of appeals reversed, with Judge Hamley dissenting as to standing (R. 223-224, 234-235). The court recognized the standing of "local conservationist organizations made up of local residents and users of the area affected by the administrative action" (R. 224). However, it distinguished the Sierra Club on the ground that "there is no allegation in the complaint that members of the Sierra Club would be affected by the actions of defendants-appellants other than the fact that the actions are personally displeasing or distasteful to them" (R. 223).

This Court has held that the standing of plaintiffs to challenge the action of federal agencies and officials has two elements. First, the plaintiff must allege that "the challenged action has caused him injury in fact, economic or otherwise." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152 (1970).

Second, the plaintiff must show that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153; *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6-7 (1968).

In determining whether these standards have been met, we submit that this Court should follow the principles enunciated by the Court of Appeals for the District of

Columbia Circuit in *Office of Communication of United Church of Christ v. Federal Communications Commission*, 359 F.2d 994, 1003-1004 (1966):[17]

> The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of these assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it. The gradual expansion and evaluation of concepts of standing in administrative law attests that experience rather than logic or fixed rules has been accepted as the guide.

In *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 869 (C.A. D.C., 1970), the court of appeals stated that "we think it time that such doubts [as to standing] were resolved in favor of hearing cases in which the public interest demands a hearing on the merits."

Similarly, we cannot assume any longer that government officials will represent the public in protecting the environment without the participation of organizations specifically devoted to this purpose. We believe that the law of standing should be liberally construed to reflect this awareness.

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[17]While the *United Church of Christ* case involved intervention before the Federal Communications Commission, the court of appeals relied on both standing and intervention cases and assumed that these standards were identical. 359 F.2d at 1000, note 8.

A. The Interests Plaintiff Seeks To Protect Are Arguably Within the "Zone of Interests" Protected by the Statutes Upon Which It Relies

There can be no doubt that the interests plaintiff seeks to protect are arguably within the zone of interests protected by the statutes on which it relies. Plaintiff makes four contentions, each of which is based on federal statutes designed to protect Sequoia National Game Refuge, Forest, or Park.

First, 16 U.S.C. 688 allows the Secretary of Agriculture to permit use of lands in Sequoia National Game Refuge only "so far as they may be consistent with the purposes for which said game refuge is established." Section 688 states that the purpose of the refuge is "to protect from trespass the public lands of the United States and the game animals which may be thereon." The use of 13,000 acres of Mineral King for a ski and summer resort is inconsistent with this purpose of the refuge. Since plaintiff is a conservation organization attempting to protect the animals of the refuge, its interest is within the zone of interests protected by the statute.

Second, 16 U.S.C. 497(a) allows the Secretary of Agriculture to grant permits for constructing resorts in national forests only for 80 acres. This statute precludes the Secretary from issuing a permit for 13,000 acres such as he plans to grant in this case (R. 31). Section 497(a) is one of several provisions which allow the use of land in national forests for homes, schools, churches, commercial and other purposes, but which restrict the amount of land which can be used to from 2 to 80 acres in order to protect the forests. 16 U.S.C. 497(b), (c), (d), 479. For Congress established the national forests for "national and public purposes" (*Light v. United States*, 220 U.S. 523, 537 (1911)) "under the conservation policy of the government" (*Chicago, M. & St.P. Ry. v. United States*, 218 Fed. 288, 293 (C.A. 9, 1914), affirmed, 244 U.S. 351). Furthermore, the statute upon

which the Secretary of Agriculture bases his purported right to issue revocable permits beyond 80 acres, 16 U.S.C. 551, gives the Secretary power only to issue rules and regulations in order "to preserve the forests thereon from destruction." Since plaintiff is a conservation organization attempting to protect the forests, its interest is within the zone of interests protected by these statutes.

Third, 16 U.S.C. 1 provides that the "fundamental purpose" of national parks is "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. 43, 45b, and 61 require the Secretary of Interior to preserve the trees, scenic beauty, and other aspects of Sequoia National Park in its natural condition. The action of the Secretary of Interior in permitting the building of a highway across the park which will damage the park and serve the new resort is inconsistent with these statutes. Since plaintiff is a conservation organization attempting to protect the scenery, natural objects, wildlife, and enjoyment by the public of the park, its interest is within the zone of interests protected by the statutes.

Fourth, 16 U.S.C. 45c provides that no electric "transmission lines . . . for the . . . transmission . . . of power within the limits of [Sequoia National Park] shall be granted or made without specific authority of Congress." The action of the Secretary of Interior in allowing the building of a major transmission line across the park to serve the new ski and summer resort violates this section. The purpose of this statute is plainly to prevent harm to the park and interference with the purposes of it. Since plaintiff is a conservation organization attempting to protect these purposes, its interest is within the zone of interests protected by the statute.

Since plaintiff is clearly within the zone of interests protected by these statutes, the sole question is whether it has suffered the degree of harm necessary to bring suit.

B. Plaintiff Has Suffered Injury of the Kind Which Gives It a Personal Stake in the Controversy and Which Assures Concrete Adverseness

We submit that the Sierra Club has standing on four distinct grounds. First, national conservation organizations with strong interest in the protection of the environment have standing to bring suit under federal statutes designed to prevent its destruction.

Second, the Sierra Club is also a local conservation organization with a special long standing interest in Mineral King and Sequoia National Park. It therefore has standing even if national conservation organizations generally lack standing to sue.

Third, the Sierra Club has standing to represent its 78,000 members who as American citizens have a direct interest in protecting the magnificent scenery, beautiful fauna, and wild animals of Sequoia National Refuge, Forest, and Park from despoilment, since they are reserved in trust for the benefit of all Americans.

Fourth, the Sierra Club has standing as itself a user of this area by regularly running camping trips into it and as the representative of its members who are users of the wildlife refuge and park.

Finally, if the Court finds that any of these arguments is not fairly encompassed within the standing allegations of the complaint or depends on evidence not in the record, the cause should be remanded to the district court to allow the complaint to be amended and an evidentiary hearing to be held.

1. *The Sierra Club Has Standing As a National Conservation Organization Interested in Protecting the Environment*

a. Constitutional Limitations

Any analysis of standing must start with Article III of the Constitution which gives the federal courts jurisdiction

only over "cases" and "controversies." However, as this court explained in *Flast v. Cohen*, 392 U.S. 83, 91-97 (1968), it is unclear how much the rules of standing are based on Article III and how much on considerations on policy. The Court noted that *Frothingham v. Mellon*, 262 U.S. 447 (1923), and subsequent cases are based on a mixture of constitutional and non-constitutional reasoning. These policy limitations are "not always clearly distinguished from the constitutional limitation." *Flast v. Cohen, supra*, 392 U.S. at 97; *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

In *Baker v. Carr*, 369 U.S. 186, 204 (1962), this Court held that standing requires "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Similarly, after lengthy analysis, the Court in *Flast v. Cohen, supra*, 392 U.S. at 101, held that "in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." The Court explained an adversary context as where (*id.* at 106):

> The questions will be framed with the necessary specificity, . . . the issues will be contested with the necessary adverseness and . . . the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution. We lack that confidence in cases such as *Frothingham* where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.

Accord, *Jenkins v. McKeithen*, 395 U.S. 411, 423 (1969); *Association of Data Processing Service Organizations, Inc. v. Camp, supra*, 397 U.S. at 152, 172 (majority and concurring opinions).

In recent years, the courts have relaxed the requirements concerning the personal stake which a plaintiff must demonstrate to show concrete adverseness. In *National Automatic Laundry Cleaning Council v. Schultz*, C.A.D.C., decided March 31, 1971, the court of appeals held that "even a minuscule pecuniary stake of the litigant may be sufficient" since recent decisions "have struct the fetters of the prior judicial inhibitions and restraints."

Concrete adverseness is often assured by the economic harm which the plaintiff has suffered and its corresponding economic interest in the outcome of the litigation. However, this Court has specifically held that the plaintiff's interest "may reflect 'aesthetic conservational, and recreational' as well as economic values. A person or a family may have a spiritual stake in First Amendment values sufficient to give him standing to raise issues concerning the Establishment Clause and the Free Exercise Clause." *Id.* at 154. Accord, *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 615-616 (C.A. 2, 1965), certiorari denied, 384 U.S. 941; *Office of Communication of United Church of Christ v. Federal Communications Commission*, *supra*, 359 F.2d at 1000-1007. Thus, conservational values of the kind involved in this case are fully adequate to serve as the basis for standing.

Plaintiff clearly satisfied the constitutional requirements for standing. The concrete adversariness of the Sierra Club in cases involving despoilment of the environment can hardly be a matter of dispute. Since the issues it raises are specific, it is not complaining generally about the conduct of government. Beginning in 1965 when it requested a hearing on three different occasions (R. 26, 41-45, 46, 47), it has opposed the development vigorously and consistently.

The Sierra Club is one of the largest conservation organizations in the country; it has 78,000 members (R. 4) organized in local chapters who paid over $1 million in dues in 1970. *Sierra Club Bulletin*, February 1971, p. 21. Since

1902 when its first pack trip went into the Sierra Nevadas, the Club has run nature trips throughout the country. The Club has a campus program which assists in organizing and supplying information to student environmental groups. The Club publishes numerous books on nature and conservation issues through its *National News Report* and the *Sierra Club Bulletin*. Currently the Sierra Club is a plaintiff in 19 suits all over the country involving efforts to protect wilderness in Colorado, the San Francisco Bay from fill, a lake in Florida from a highway, the Gila River of Arizona from channelization, a marsh in Pennsylvania from a road project, an alpine lake in Washington from a mining operation, and other abuses of the environment. The Club is also an intervenor in 9 cases and an *amicus curiae* in 10 other environment cases. *Sierra Club Bulletin*, January, 1971, pp. 28-29.

The Court of Appeals for the Second Circuit has said that the Sierra Club is a "national conservation organization with substantial membership . . . and a history of involvement in the preservation of national scenic and recreational resources." *Citizens Committee for Hudson Valley v. Volpe*, 425 F.2d 97, 103 (1970), certiorari denied, No. 615, this Term. The district court specifically found, by upholding the standing paragraph of the complaint, that the Sierra Club for many years has had a special interest in conservation and the protection of the national parks, game refuges, and forests and that one of its principal purposes is to protect the resources of the Sierra Nevada Mountains (R. 4, 197).

Such a plaintiff has the "concrete adverseness which sharpens the presentation of issues" far more than any ordinary plaintiff. The court of appeals conceded (R. 224) and numerous cases hold (see p. 62 below) that any local resident who uses an area can sue to protect it from despoilment. Such a user may simply use it for occasional camping or hiking and he may only have had an interest for a few years. He may have little in the way of resources to provide fully adequate representation.

In contrast, a national conservation organization, like the Sierra Club, will generally have adequate resources. It will have demonstrated its interest in protecting the environment either by conducting activities over a long period of time (like the Sierra Club, Wilderness Society, and Izaak Walton League) or by starting major programs more recently (like Friends of the Earth). In either event, the court will have maximum assurance that there will be a "case" or "controversy" before it.

In *Office of Communication of United Church of Christ v. Federal Communications Commission, supra,* 359 F.2d at 1002, the court of appeals stated in upholding the standing of a national church organization:

> Since the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listen-in audience.

We submit that national conservation organizations have an equally deep concern with the environment as the church organization had with broadcasting in that case.

b. Non-Constitutional Limitations

This Court has suggested that several non-constitutional policy reasons also limit the standing of plaintiffs to sue in the federal courts. In *Frothingham v. Mellon, supra,* 262 U.S. at 486-487, the Court said that the plaintiff, a federal taxpayer, had a "comparatively minute and indeterminable" interest in federal tax revenues. It also indicated that the courts might be flooded with suits "in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned." *Id.* at 487. See *Flast v. Cohen, supra,* 392 U.S. at 93.

Neither of these policy considerations militate against standing in this case. Moreover, an additional policy reason, the lack of any other persons with a better claim to standing in many environment cases, affirmatively supports the standing of national conservation organizations.

Substantiality of Plaintiff's Interest. As we have seen pp. 36-37), the interest of the Sierra Club in protecting the environment from despoilment is hardly minute. It has had a substantial interest since its founding in 1892. The substantiality of its interest strongly supports a finding of standing.

Burden on the Courts. The right of the Sierra Club and other national conservation organizations to bring suit adds no substantial burden on the federal courts. Only a handful of such organizations exist and they do not have the resources to bring more than a few dozen federal suits a year. Indeed, the number is still far too small to challenge more than a handful of the actions of government agenices and private corporations which have serious effects on the environment.

The more relaxed rules for intervention before federal agencies and for standing in the courts have not overburdened them. As the Court of Appeals for the Second Circuit noted in *Scenic Hudson Preservation Conference v. Federal Power Commission, supra,* 354 F.2d at 617, "our experience with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken." Similarly, *Associated Industries, Inc. v. Ickes,* 134 F.2d 694, 707 (C.A. 2, 1943), vacated as moot, 320 U.S. 707, rejected the possibility of the courts being overburdened by thousands of cases by stating that "no such horrendous possibilities exist." And more recently in *Scanwell Laboratories, Inc. v. Shaffer, supra,* 424 F.2d at 872, the court said that:

> The spectre of opening a Pandora's box of litigation has always seemed groundless to us, particularly in the area of standing to sue. Certainly the hue and cry went up when the states relaxed the criteria

> for standing to sue; but so far the dockets in the states have not increased appreciably as a result of new cases in which standing would previously have been denied.

Accord, *National Welfare Rights Organization v. Finch*, 429 F.2d 725, 738 (C.A. D.C., 1970).[18]

Since the court of appeals recognized that local conservation organizations and users had standing and could have brought suit, the court's holding, as applied to this and similar cases, would not reduce the number of cases brought in the federal courts. Indeed, national conservation organizations, in contrast to most small local groups and individuals, have the broader outlook to analyze situations more carefully before they litigate and to bring only the strongest cases. As the court of appeals said in *Office of Communication of the United Church of Christ v. Federal Communications Commission, supra*, 359 F.2d at 1005, with relation to a national church organization, such "responsible and representative groups . . . usually concern themselves with a wide range of community problems and tend to be representatives of broad as distinguished from narrow interests, public as distinguished from private or commercial interests." Thus, if standing is denied national organizations and confined to local groups and individuals, this may simply encourage

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[18]Professor Kenneth Culp Davis has written (The Liberalized Law of Standing, 37 *U. of Chi. L. Rev.* 450, 471):

> [E]xperience of the federal courts . . . shows that floods of litigation do not result when the judicial doors are opened to all. A 1953 case [*Reade* v. *Ewing*, 205 F.2d 630 (C.A. 2, 1953)] held that a "consumer"—anyone who eats—has standing to challenge action of the Food and Drug Administration; if consumers have brought many cases, they must all be unreported. Many statues, including the Food and Drug Act and the Communications Act, have long provided specifically for standing of "any person adversely affected" but litigation under these statutes seems to be no more voluminous than litigation under other statutes. Half or more of the specific statutes are as broad . . . but the litigation is in dribbles, not floods.

more, less well prepared, and less meritorious actions. On the other hand, "representation of common interests" by an organization such as the Sierra Club may serve to limit the number of those who might bring suit. *Scenic Hudson Preservation Conference v. Federal Power Commission, supra,* 354 F.2d at 617; *National Welfare Rights Organization v. Finch, supra,* 429 F.2d at 739; *Powelton Civic Home Owners' Ass'n v. Department of Housing and Urban Development,* 184 F.Supp. 809, 828, note 11 (E.D. Pa., 1968). Thus, the right of national environment organizations to bring suit may often reduce the burden on the federal courts.

Lack of Anyone Else With a Better Claim to Standing. While in this case local users could well have brought suit—indeed, as we will argue below (pp. 62-63), the Sierra Club itself in a user and represents members who are users—there are suits which under the decision of the court of appeals could not have been brought at all. Environment cases increasingly raise issues which do not involve, or only incidentally involve, direct users: The protection of wilderness areas, the preservation of wildlife refuges, the survival of rare and endangered species, the integrity of natural rivers, and the natural or scenic aspect of landscape. Those who bring such suits may incidentally be users in that they or their members have walked, watched and beheld the subject of the litigation. However, such use is often incidental to the larger purpose to protect the integrity of the environment. And if the only persons with standing are users, no one will have standing where there is no present use (such as a suit to preserve the wilderness) or no use is possible (such as a suit to prevent the chemical poisoning of eagles).[19]

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[19]The following cases involve either no possible uses or, while possible, use is minimal:

Wilderness Society v. Hickel, D. D.C., decided April 23, 1970 (1 Environment Reporter 1335) (Alaska pipeline case involving the Alaska wilderness).

Parker v. United States, 307 F. Supp. 688, 309 F. Supp. 593 (D. Colo., 1969), on appeal to the Tenth Circuit (protection of forest wilderness).

(continued)

Even where there are users, they may be unwilling to sue. Nearby resident-users of a wilderness area may desire develop-

West Virginia Highland Conservancy v. Island Creek Coal Co., C.A. 4, decided April 6, 1971 (involving despoilment of a possible wilderness area).

Citizens Commission for the Columbia River v. Resor, D. Ore., No. 69-498 (protection of a wildlife refuge and Columbia River from fill to build an airport).

Alpine Lakes Protection Society v. Hardin, W. D. Wash., No. 885 (protection of national forest from motorized travel via trail).

Izaak Walton League v. St. Clair, 313 F. Supp. 1312 (D. Minn., 1970 (protection of wilderness area from mineral exploration).

Gandt v. Hardin, W. D. Mich., decided December 11, 1969 (protection of wilderness qualities of a forest).

Thermal Ecology Must be Preserved v. Atomic Energy Commission, 433 F.2d 524 (C.A. D.C., 1970) (protection of fish and aquatic environment from thermal pollution from atomic power plants).

EDF v. Corps of Engineers, E. D. Ark., decided February 19, 1971 (2 Environment Reporter 1260) (protection of fish and aquatic birds from a proposed dam).

EDF v. Corps of Engineers, D. D.C., decided January 27, 1971 (2 Environment Reporter 1173) (protection of birds, fish, and forests from cross-Florida barge canal).

Sierra Club v. Laird, D. Ariz., decided June 23, 1970 (1 Environmental Law Reporter 20085) (protection of fish and other wildlife from channel clearing).

Association of Northwest Steel Headers v. Corps of Engineers, E. D. Wash., Civ. No. 3362 (protection of fish and Snake River from a dam).

Sierra Club v. Hardin, D. Alaska, decided March 30, 1971 (2 Environment Reporter 1385) (preservation of a national forest, including nesting grounds of bald eagle).

EDF v. Corps of Engineers, D. D.C., Civ. No. 1722-70 (prevention of DDT discharge into waters flowing into wildlife refuge).

Texas Committee on Natural Resources v. United States, W.D. Tex., decided February 5, 1970 (1 Environment Reporter 1303), affirmed on other grounds by Fifth Circuit, August 25, 1970 (protection of last habitat of rare golden-cheeked warbler).

Stewart v. Resor, E.D. Pa., Civ. No. 70-551 (stopping highway to protect fish and wildlife).

Pennsylvania Environmental Council v. Bartlett, 315 F. Supp. 238 (M.D. Pa., 1970), on appeal to the Third Circuit (protection of fish and wildlife from a highway).

ment because of the economic benefits which will result.[20] National conservation organizations may be the only parties who will represent the national, as contrasted to local, interest by opposing development. This conflict between local and national interests is particularly obvious and significant with regard to national parks, wildlife refuges, and forests which must be preserved even if local residents desire to develop them.

Furthermore, as the statute establishing the National Park Service makes clear, the purposes for which the national parks are created is "to conserve the scenery and the national and historic objects and the wildlife therein. . . ." 16 U.S.C. 1. Similarly, 16 U.S.C. 688 provides that the purpose of the Sequoia Game Refuge is "to protect from trespass the public lands of the United States and the game animals which may be thereon." And 16 U.S.C. 551, upon which the Secretary of Agriculture bases his power to issue the revocable permit for use of 13,000 acres, allows him only to make rules and regulations "to preserve the forests thereon from destruction." It follows that conservationists must have standing to protect the national interest in preserving the national

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Humane Society of the U.S. v. Russell, D. D.C., Civ. No. 3627-70 (protection of deer in a wildlife refuge from a deer hunt).

Save America's Vital Environment, Inc. v. Irwin, N.D. Ga., Civ. No. 14700 (protection of birds and fish from fire and eradication program using the pesticide mirex).

National Audubon Society v. Johnson, 317 F. Supp. 1330 (S.D. Tex., 1970), appeal dismissed by Fifth Circuit) (protection of marine life and especially whooping crane from dredging of oyster shells).

In addition, several cases concerning pesticides involve protection of animals and birds as well as man and presumably would have been brought even if only animals were affected. *Environmental Defense Fund v. Finch,* 428 F.2d 1083 (C.A.D.C. 1970) (DDT), *Environmental Defense Fund v. Hardin,* 428 F.2d 1093 (C.A.D.C. 1970) (DDT); *Wellford v. Ruckelshaus,* C.A.D.C., decided January 7, 1971 (2 Environment Report 1123) (2, 4, 5-T).

[20]It is for this reason that Tulane County has supported the defendants in this litigation.

parks, game refuges, and forests for these purposes which do not involve use.

The petitioner—the Sierra Club—and the four amici curiae supporting the petitioner—the Wilderness Society, Friends of the Earth, the Isaak Walton League, and the Environmental Defense Fund[21]—all have as their principal interest the protection and conservation of the environment. While the Sierra Club, Wilderness Society and the Isaak Walton League are also interested in appropriate uses of natural areas consistent with conservation of the environment, this is not their principal interest. They should not be required to assert this subsidiary interest in order to obtain standing to prevent despoilment of the environment. The other two organizations do not represent users at all and cannot assert standing on that basis.

If these organizations and other non-users were denied standing to challenge government actions where no users exist or are involved only incidentally, this would of course slightly reduce the number of cases in the federal courts. But no policy justifies standing requirements which eliminate any possible plaintiff so that agency actions could not be challenged in the courts for having violated federal statutes. This and other courts have consistently relied on the lack of any other persons with a better claim to standing in upholding the standing of plaintiffs then before the court.

In *Federal Communications Commission v. Sanders Bros. Radio Stations*, 309 U.S. 470, 477 (1940), this Court gave us as one reason for permitting a radio station to challenge the grant of a license to a competitor that the radio station would likely be "the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission. . . ." In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64, note 6 (1963), the Court upheld the standing of a publisher of books to challenge the

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[21]The Environmental Defense Fund has filed a separate brief supporting the petitioner.

constitutionality of a statute directed at distributors because the "pragmatic considerations argue strongly for the standing of publishers in cases such as the present one." These considerations consisted of the likelihood that publishers would be more likely to sue than distributors and "unless [the publisher] is permitted to sue, infringements of freedom of the press may too often go unremedied." *Ibid.* Similarly, in *Office Communication of the United Church of Christ v. Federal Communications Commission, supra,* 359 F.2d at 1004-1005, the court upheld the standing of listeners in part because they are likely to be the only ones to challenge programming deficiencies and overcommercialization in radio and television license renewals before the Commission. Accord, *Pittsburgh v. Federal Power Commission,* 237 F.2d 741, 746 (C.A. D.C., 1956); *Scanwell Laboratories, Inc. v. Shaffer, supra,* 424 F.2d at 863-865; *Powelton Civic Home Owners' Assn. v. Department of Housing and Urban Development, supra,* 284 F.Supp. at 827; *Sierra Club v. Hardin* D. Alaska, decided March 30, 1971 (2 Environment Reporter 1385, 1392).

c. Statutory Aids to Standing

Congress of course cannot permit suits to be brought in federal courts which do not involve cases or controversies. *Muskrat v. United States,* 219 U.S. 346 (1911). Congress, however, can (1) help to define when a case or controversy exists and (2) override non-constitutional policy limitations on standing. As Judge Frank stated in the leading case of *Associated Industries v. Ickes, supra,* 134 F.2d at 704, which examined at length the right of plaintiffs to sue as private Attorneys General:

> While Congress can constitutionally authorize no one, in the absence of an actual justificable controversy, to bring a suit for the judicial determination either of the constitutionality of a statute upon govern-

> ment officers, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.

Accord, *Reade v. Ewing*, 205 F.2d 630, 632 (C.A. 2, 1953). The court in *Associated Industries* pointed to *United States ex rel., Marcus v. Hess*, 317 U.S. 537 (1943), which affirmed a judgment under the Federal Informers Act in favor of a private citizen who had not himself been defrauded but who had sued for fraud on behalf of the government.

Although in the present case Congress has not passed a statute specifically authorizing national conservation organizations to bring suit, both the Administrative Procedure Act and National Environmental Policy Act strongly support the standing of national conservation organizations in challenging the actions of federal officials.

Administrative Procedure Act. Plaintiff brought suit under the Administrative Procedure Act (R. 3), which provides (5 U.S.C. 702):

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency

> action within the meaning of a relevant statute, is entitled to judicial review thereof.

The Act has clearly expanded the standing of persons to bring suits in the federal courts. As this Court stated in *Association of Data Processing Service Organizations, Inc. v. Camp, supra,* 397 U.S. at 154:

> Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved "persons" is symptomatic of that trend.

While some earlier cases have construed the Administrative Procedure Act to add little or nothing to the existing law of standing (*e.g., Pennsylvania Railroad Co. v. Dillon,* 335 F.2d 292, 294-95 (C.A. D.C., 1964)), more recently the courts have generally held that the Act "reenforces a judicial trend liberalizing standing . . . ." *Curran v. Laird,* 420 F.2d 122 (C.A. D.C., 1970) (*en banc*). Accord, *Norwalk CORE v. Norwalk Redevelopment Agency,* 395 F.2d 920, 933, note 25 (C.A. 2, 1968); *Scanwell Laboratories, Inc. v. Shaffer, supra,* 424 F.2d at 865-870; *Triangle Improvement Council v. Ritchie,* 314 F. Supp. 20, 27-28 (S.D. W. Va., 1969), affirmed, 429 F.2d 423 (C.A. 4), pending on writ of certiorari, No. 712, this Term. Similarly, in *Ballerina Pen Co. v. Kunzig,* 433 F.2d 1204, (C.A. D.C., 1970), the court of appeals upheld standing because of the basic purpose of the Administrative Procedure Act to assure that federal agencies, whose powers have such a far-reaching effect on citizens, complied with the will of Congress: "[A]n impartial court is required to ascertain the degree of delegation of authority the Congress intended and to determine whether the agency in question has exceeded the bounds of its delegated authority." *Id.* at 1208.

This liberal construction of the Administrative Procedure Act with regard to standing is consistent with numerous decisions of this Court. In *Wong Yang Sung v. McGrath,* 339 U.S. 33, 36 (1950), the Court reviewed at length the

background of the Act because "determination of questions of its coverage may well be approached through consideration of its purpose as disclosed by its background." The Court, noted that "the conviction developed . . . that [the administrative] power was not sufficiently safeguarded and sometimes was put to arbitrary and biased use." *Id.* at 37. The Court concluded that "it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the act warrant, to give effect to its remedial purposes where the evils it was aimed at appear." *Id.* at 41.

Subsequently, in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), this Court considered the scope of review under the Administrative Procedure Act. It stated that earlier cases "have been reinforced by the enactment of the Administrative Procedure Act . . . . The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed this theme by noting that the Administrative Procedure Act's 'general review provisions' must be given a 'hospitable' interpretation." *Id.* at 140-141. And in *Chicago v. United States*, 396 U.S. 162, 164 (1969), this Court said that "we start with the prescription that aggrieved persons may obtain review of administrative decisions unless there is 'persuasive reason to believe' that Congress had no such purpose." Accord, *Heikkala v. Barber*, 345 U.S. 229, 232-233 (1953); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955); *Rusk v. Cort*, 369 U.S. 367, 379 (1962); *Association of Data Processing Service Organizations, Inc. v. Camp*, *supra*, 397 U.S. at 157; *Barlow v. Collins*, 397 U.S. 159, 165 (1970); *Tooahnippah v. Hickel*, 397 U.S. 598, 606 (1970); *Citizens to Preserve Overton Park, Inc. v. Volpe*, No. 1066, this Term, decided March 2, 1971.

While none of these cases specifically involved standing, there is no reason why 5 U.S.C. 702, the standing provision of the Act, should receive any narrower, less hospitable interpretation than any of its other provisions and particularly those relating to judicial review.

National Environmental Policy Act. The National Environmental Policy Act declares that it is "national policy," *inter alia,* "to promote efforts which will prevent or eliminate damage to the environment" (42 U.S.C. 4321) and federal policy to use "all practical means and measures" to protect the environment in cooperation with "concerned public and private organizations" (*id.* at 4331(a)). Russell E. Train, the Chairman of the President's Council on Environmental Quality, which was established by the Act and has the responsibility to ensure that the Act is complied with (42 U.S.C. 4321, 4344; Exec. Order No. 11514(13), 35 Fed. Reg. 4247) has stated that (1 Environment Reporter 745):

> Private litigation before courts and administrative agencies has been and will continue to be an important environmental protection technique supplementing and reenforcing government environmental protection programs.

The Council has itself specifically noted with approval judicial decisions which upheld the standing of national conservation organizations. 1 Environment Reporter 746.

Even more specifically, the Legal Advisory Committee to the Council unanimously passed a resolution in the fall of 1970 (quoted in Statement by Timothy Atkeson, General Counsel, Council on Environmental Quality, before the Subcommittee on the Environment of the Senate Committee on Commerce, April 15, 1971):

> Where an organization or group of citizens devoted to, or with a demonstrated interest in environmental protection asserts a claim against an agency of the Government in reliance on the provisions of the National Environmental Policy Act, or of other legislation designed to protect the environment, the interposition by the Government of the defense of lack of standing is inconsistent with the federal environmental policy, as exemplified in the National Environmental Policy Act and in other legislation.

The Council on Environmental Policy has itself adopted this position. *Ibid.*

Thus, the Council on Environmental Policy has concluded that the National Environmental Policy Act provides standing for conservation organizations, like the Sierra Club, which assert claims under statutes, like those in this case. This interpretation by the federal agency charged with administering the Act is entitled to great weight as to its meaning. *E.g., Udall v. Tallman,* 380 U.S. 1, 16 (1965). And the Act, in turn, provides support for the courts in upholding the standing of national conservation organizations in asserting claims under statutes designed to protect the environment.

d. Judicial Decisions

The Court of Appeals for the Ninth Circuit has held in this case that national environment organizations have not been sufficiently injured to have standing to bring this suit.[22] This decision is inconsistent with the views of every other court which has specifically or implicitly ruled on this issue.

Earlier, this year, this Court held that federal highways could not be built through public parks if a feasible alternative route existed. *Citizens to Preserve Overton Park, Inc. v. Volpe,* No. 1066, this Term, decided March 2, 1971. The Court specifically noted that petitioners were "private citizens as well as local and national conservation organizations . . . ." The national organizations were the Sierra Club and Audubon Society. Since standing, at least insofar as the constitutional requirements of Article III are concerned, involves jurisdiction, the decision in the *Overton Park* case at least implicitly supports the standing of national conservation organizations to sue to protect the environment.

The holding of the court of appeals in this case is in square conflict with decisions of two other circuits and several

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[22] In a subsequent case, *Alameda Conservation Ass'n v. California,* 437 F.2d 1087 (1971) (Judge Merrill dissenting), certiorari denied, No. 1300, this Term, the Ninth Circuit held that a local conservation organization did not have standing to protect San Francisco Bay from fill although eight individuals living near the Bay did have standing.

district courts. The court below specifically rejected (R. 224, note 9) the holding in *Citizens Committee for the Hudson Valley v. Volpe*, 425 F.2d 97 (C.A. 2, 1970), certiorari denied, No. 615, this Term, that national conservation organizations, and specifically the Sierra Club, have standing. In contrast to the Ninth Circuit's holding, the Second Circuit explicitly upheld the Sierra Club's standing on the ground that the Club and the other plaintiffs (*id.* at 102):

> made no claim that the proposed Expressway or the issuance of the dredge and fill permit threatened any direct personal or economic harm to them. Instead they asserted the interest of the public in the natural resources, scenic beauty and historical value of the area immediately threatened with drastic action, claiming that they were "aggrieved" when the Corps acted adversely to the public interest. They are . . . serving as "private Attorney Generals" to protect the public interest.

The court then explained (*id.* at 103):

> [Plaintiffs] have evidenced the seriousness of their concern with local natural resources by organizing for the purpose of cogently expressing it, and the intensity of their concern is apparent from the considerable expense and effort they have undertaken in order to protect the public interest which they believe is threatened by official action of the federal and state governments. In short, they have proven the genuineness of their concern by demonstrating that they are "willing to shoulder the burdensome and costly processes of intervention" in an administrative proceeding . . . . They have "by their activities and conduct . . . exhibited a special interest" in the preservation of the natural resources of the Hudson Valley.

Similarly, the decision below is in conflict with *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1097 (C.A. D.C., 1970), where the court held that national conservation organizations had standing to attack the continued marketing of DDT:

> [T]he consumers' interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem.
>
> On the basis of petitioners' uncontroverted allegations, it appears that they are organizations with a demonstrated interest in protecting the environment from pesticide pollution. Therefore they have the necessary stake in the outcome of a challenge to the Secretary's inaction to contest the adverseness required by Article III of the Constitution.

The national organizations whose standing was upheld included the Environmental Defense Fund, the Izaak Walton League, the National Audubon Society and the Sierra Club, the plaintiff in this case. Accord, *Environmental Defense Fund, Inc. v. HEW*, 428 F.2d 1083, 1085, note 2 (C.A. D.C., 1970).

Several district courts have also upheld the standing of national conservation organizations. In *EDF v. Corps of Engineers*, E.D. Ark., decided Feb. 19, 1971 (2 Environment Reporter 1260), the district court upheld the standing of the Environmental Defense Fund and three Arkansas conservation organizations to bring suit to enjoin the construction of a dam because of its environmental effects. The court noted that (2 Environment Reporter at 1281):

> They are all nonprofit organizations composed of members who have a sincere and vital common interest in protecting those environmental values which they deem to be most important to this, and future, generations of American citizens. It is true they have no direct and personal economic interest in the Cossatot River or the lands lying adjacent thereto, but these organizations wish to represent what they deem to be "public" interest in this river and its environs. Each of the organizations has demonstrated its interest in such matters as that represented by this lawsuit.

After reviewing the recent changes in the federal law of standing, the court held that the rationale of this Court's recent decisions (*id.* at 1283):

> if not the precise holdings, clearly indicates that such plaintiff organizations . . . have standing to sue. There can be no doubt that the corporate plaintiffs are interested and antagonistic enough to present the issues vigorously and with the "concrete adverseness" referred to in *Baker v. Carr*. . . . Furthermore, . . . the National Environmental Policy Act of 1969 makes clear the recognition by Congress of the important role of such private organizations to cooperate with "concerned . . . private organizations" to further the policies of the Act.

In *Izaak Walton League v. St. Clair*, 313 F. Supp. 1312, 1316 (D. Minn., 1970), the court upheld the standing of a national conservation organization to enjoin drilling for and removing minerals from a wilderness area:

> Clearly here the plaintiff, Izaak Walton League, will present the case in "an adversary context." The League has a long history of activity in conservation matters and natural resource preservation. . . . There is no doubt in the court's mind that plaintiff actively will pursue in an adversary way the prosecution of this suit and has:
>
> > alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? 369 U.S. 186, at 204 . . . in Baker v. Carr.
>
> There will be no collusive suit nor a mere nominal presentation.

The court said further that the League is "not a 'johnny-come-lately' or an *ad hoc* organization and its interest in the wilderness movement is continuing, basic and deep. It therefore has an 'aesthetic, conservational and recreational' interest to protect." *Id.* at 1317. Accord, *Parker v. United States*, 309 F. Supp. 593 (D. Colo., 1970) (upholding, *inter alia*,

the standing of the Sierra Club because plaintiffs "have special interest in the values which Congress sought to protect by enacting" the statutes relied upon); *Wilderness Society v. Hickel*, D. D.C., decided April 23, 1970 (1 Environment Reporter 1335, 1337); *EDF v. Corps of Engineers*, D. D.C., decided January 27, 1971 (2 Environment Reporter 1173, 1174) (upholding the standing of the Environment Defense Fund because "through their research and other activities [they] have actively sought to preserve and enhance the environment" and therefore "they have alleged a personal stake in the outcome of the controversy").

In short, the Administrative Procedure Act, the National Environmental Policy Act and numerous judicial decisions all support the standing of national environment organizations, like the Sierra Club, to bring suit to protect the environment. Such organizations have the concrete adverseness to satisfy the constitutional requirement of a "case" or "controversy" and do not violate any of the non-constitutional standing requirements which have been imposed by the courts. Consequently, these national conservation organizations have the right to bring litigation to ensure that federal officials and agencies are following statutory mandates in preventing further destruction of our environment.

2. *The Sierra Club Has Standing as a Local Organization Interested in Protecting Sequoia National Game Refuge, Forest, and Park*

We have contended above that the Sierra Club has standing as a national conservation organization to challenge the actions of federal officials despoiling the environment in Sequoia National Game Refuge, Forest, and Park. Even if we are wrong in this contention, the Sierra Club has standing as a local organization long interested in protecting this particular area.

There can be no doubt that local conservation organizations have standing to protect the environment in their areas.

The court below itself stated that "local conservationist organizations made up of local residents and users of the area, affected by the administrative action" have standing (R. 224). The court, however, found that "no such . . . organizations with a direct and obvious interest have joined as plaintiffs in this action" (R. 224).[23]

Several other decisions have also held that local conservation organizations have standing. In *Washington Department of Game v. Federal Power Commission*, 207 F.2d 391, 395, note 11 (1953), certiorari denied, 347 U.S. 936, the Ninth Circuit held that the Washington State Sportsmen's Council had standing as a party aggrieved since it claimed that the dams "will destroy fish in which they . . . are interested in protecting." More recently, *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, C.A. 4, decided April 6, 1971, held that since the Conservancy has a "special interest" in protecting a wilderness area from destruction, it had standing to sue to protect it. In *Pennsylvania Environmental Council, Inc. v. Bartlett*, 315 F. Supp. 238, 245 (M.D. Pa., 1970), the court held that the Council was aggrieved under the Administrative Procedure Act because one of its "principal purposes . . . is to protect and conserve the material resources, aesthetic qualities and recreational value of areas" like the valley and park involved in that case. And in *Crowther v. Seaborg*, 312 F. Supp. 1205, 1216 (D. Colo. 1970) the court upheld, in a case involving detonation of an atomic bomb, that the Colorado Open Space Coordinating Council "is adversely affected and aggrieved" and therefore has standing to assert "the interests of all these persons entitled to the full benefit, use and enjoyment of the natural resources of the State of Colorado . . . ." Accord, *Scenic Hudson Preservation Conference v. Federal Power Commission, supra*, 354 F.2d at 616; *Road Review League*

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[23] In a subsequent case, however, the Court of Appeals for the Ninth Circuit has held that even a local conservation organization lacks standing to sue to protect the environment. *Alameda Conservation Ass'n v. California, supra*, 437 F.2d at 1087.

v. Boyd, 270 F. Supp. 650, 661 (S.D. N.Y., 1967); *Delaware v. Penn Central*, D. Del., decided February 24, 1971 (2 Environment Reporter 1355, 1358-1359). In addition, the decisions cited above (pp. 50-54) upholding the standing of national conservation organizations apply *a fortiori* to local organizations.

The determination of the court below that the Sierra Club is not a local conservation organization with local residents and users of the area is clearly contrary to the facts. While it has since become a national organization, the Sierra Club started as an organization devoted to exploring and protecting the Sierra Nevada Mountains. Its articles of incorporation state that this is its principle interest. *Sierra Club Handbook* 60 (1969). As we have described above (pp. 23-29), John Muir, the founder of the Sierra Club, was intimately involved in exploring the magnificence of the Sierra Nevada Mountains and the Sierra Club led the fight for the protection of the entire Sequoia area. In large part because of its efforts, Sequoia National Park was created and Mineral King was made part of the Sequoia National Game Refuge. Thus, the Sierra Club has been working to protect this specific area since its founding almost 80 years ago.

Even today, the Sierra Club still has its headquarters in San Francisco and 27,000 of its 78,000 members reside in the San Francisco area (R. 4). It runs a camping trip yearly into Mineral King (*Sierra Club Handbook* 24 (1969)) and continues to have a particular interest in protecting this area as is evidenced by this litigation.

In short, whatever other national interests the Sierra Club might have, it is still, in considerable part, a local organization interested in protecting the Sierra Nevada Mountains in general and Sequoia National Game Refuge and Park in particular. There can be no doubt that it has the concrete adverseness to have standing in this litigation and to present the issues vigorously in the courts.

All these facts are either clear from the record or are part of the indisputable history of California. However, if there is any doubt concerning them, this Court should remand the case to the district court to allow the presentation of evidence concerning the Sierra Club's long involvement and concern for the protection of the very area involved in this litigation.[24]

3. *The Sierra Club Has Standing as an Organization Representing the Interests of Its Members in Protecting Lands Held in Trust for the American People in National Game Refuges, Forests and Parks*

a. Lands Held In Public Trust

The concept of land held in public trust has long been recognized by the courts. Government land not held for sale must be managed in a manner which is consistent with the purposes for which it is held. This general principle is affirmed in *Illinois Central v. Illinois,* 146 U.S. 387, 452 (1892), in which this Court stated that the title under which Illinois held land under the navigable waters of Lake Michigan is "different in character from that which the state holds in lands intended for sale. . . . It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction of interferences of private parties." The Court went on to invalidate the transfer of the submerged land from the state to a private corporation, on the ground that the transfer violated the state's public trust.

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[24]This contention, in this day of notice pleading, seems fairly included within the standing allegations. The complaint alleges that 27,000 of 78,000 members of the Sierra Club live in the San Francisco Bay area and that a principal purpose of the Club is to protect the Sierra Nevada Mountains (R. 4).

The courts have applied this concept specifically to national park and forest land. In *Allen v. Hickel,* 424 F.2d 944, 947 (1970), the Court of Appeals for the District of Columbia Circuit considered a challenge to the use of the Ellipse, which is national parkland, behind the White House. In upholding the standing of five individual citizens, the court stated that "citizens may sue to enjoin a government holding land in trust as a park from impermissibly diverting the use as to destroy their beneficial interest as park users." The court did not insist that they be actual users; it was enough that they "were entitled, as members of the public, to enjoy the park land . . . ."

Similarly, in *Archbold v. McLaughlin,* 181 F. Supp. 175, 180 (D. D.C., 1960), the district court upheld the standing of individuals to challenge the construction of a highway through a park:

> Land dedicated to the use of the public for park purposes is held in trust for that use, and a resident of the city or town in which the park is located may maintain a suit in equity to prevent diversion of the use of such land, since "courts of equity always interfere at the suit of a cestui que trust or a cestui que use to prohibit a violation of the trust, or a destruction of the right of user."

Where, as in this case, the park is not a local one and the trust is for the benefit of all American citizens, it would appear that any citizen can bring suit to require the federal agencies to protect the game refuge, forest and park from uses inconsistent with the purpose for which this land was reserved.

These principles have also been specifically applied to national forests. In *Utah Power & Light Co. v. United States,* 243 U.S. 389 (1917), a power company claimed the right to maintain a series of dams, reservoirs, pipe lines, power houses, transmission lines and subsidiary structures which it had installed in a United States forest reservation with the knowledge of officers and employees in the forestry

service, but without the statutory authorization of Congress. This Court held that, in suits by the United States to evict the power company and restore the forest to its proper use, the United States was not estopped by its officers' unauthorized consent. The court explained that "[a] suit [in equity] by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane . . . from the ordinary private suit. . . ." *Id.* at 409. Accord, *Light v. United States,* 220 U.S. 523, 537 (1911); see also *United States v. Trinidad Coal Co.,* 137 U.S. 160, 170 (1890); *Causey v. United States,* 240 U.S. 399 (1916); Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, 68 *Mich. L. Rev.* 471, 492-496 (1970).

The purpose of the national parks is "to conserve the scenery and the national historic objects and the wild life therein . . . ." 16 U.S.C. 1. The purpose of Sequoia National Park is specifically to protect the trees, scenic beauty, and other aspects of the park in its natural condition (16 U.S.C. 43, 45b, 61) and to serve as a "public park, or pleasure ground, for the benefit and enjoyment of the people" (16 U.S.C. 41). The Sequoia Game Refuge was designed to protect the land and animals, and national forests are intended to protect the forests. 16 U.S.C. 688, 551. Consequently, these lands are held in trust for all Americans without regard to whether they are intended for use.

When a trustee does not defend the title to trust property, the beneficiary is entitled to bring suit to protect his interests. *Restatement of Trust,* Sec. 282. "It is well settled that a fiduciary who refuses to bring suit against a third party for the benefit of his cestui abuses his trust. In such event the cestui may maintain a bill in equity against the trustee in which the third party may be joined as a defendant." *Manning v. Miller Music Corp.,* 174 F. Supp. 192, 196 (S.D. N.Y., 1959). The members of the Sierra Club like all American citizens therefore have the right to sue to prevent despoilment of lands held in trust for them.

b. Representation of Members

This Court has frequently held that an organization has standing to represent its members when the latter have standing. In *National Motor Freight Traffic Association v. United States*, 372 U.S. 246, 247 (1963), this Court upheld the standing of associations of motor carriers as "proper representatives of the interests of their members." Accord, *E.g., N.A.A.C.P. v. Alabama ex rel. Patterson*, 352 U.S. 449, 458-459 (1958); *Bates v. Little Rock*, 361 U.S. 516, 523, note 9 (1959); *Louisiana ex rel. Gremillion v. N.A.A.C.P.*, 366 U.S. 293, 296 (1960); *N.A.A.C.P. v. Button*, 371 U.S. 415, 428 (1963). See also *National Association of Securities Dealers, Inc. v. Securities and Exchange Commission*, No. 59, this Term, decided April 15, 1971.

In *National Automatic Laundry and Cleaning Council v. Schultz*, decided March 31, 1971, the Court of Appeals for the District of Columbia noted the "line of cases that show a wide disposition to allow associations to appear as representatives of their members and to grant them standing to seek to vindicate the interest of those members." Accord, *Associated Industries v. Ickes, supra*, 134 F.2d at 712-713; *Archbold v. McLaughlin, supra*, 181 F.Supp. at 180; *National Coal Ass'n v. Federal Power Commission*, 191 F.2d 462 (C.A.D.C., 1951); *McArthur Liquors, Inc. v. Palisades Citizens Ass'n*, 265 F.2d 372, 374 (C.A.D.C., 1959); *Citizens Ass'n of Georgetown v. Simonson*, 403 F.2d 175, 176 (C.A.D.C., 1968); *United Federation of Postal Clerks v. Watson*, 409 F.2d 462, 469-470 (C.A.D.C. 1969), certiorari denied, 396 U.S. 902; *National Student Ass'n v. Hershey*, 412 F.2d 1103, 1120-1121 (C.A. D.C., 1969); *South Hill Neighborhood Ass'n v. Romney*, 421 F.2d 454 (C.A. 6, 1969) (holding of district court adopted by court of appeals); *Powelton Civic Home Owners' Ass'n v. Department of Housing and Urban Development, supra*, 284 F. Supp. at 828; *National Ass'n of Letter Carriers v. Blount*, 305 F. Supp. 546, 548 (D. D.C., 1969), appeal dismissed, No. 101, this Term. As the court of appeals held in *Citizens Ass'n of Georgetown v. Simonson, supra*, 403

F.2d at 176, "since the association is an authorized spokesman organized to promote those interests for its members, it too has standing to sue in order to protect their interests." And in *National Ass'n of Letter Carriers v. Blount, supra,* 305 F. Supp. at 548, the court upheld the standing of an organization since it "is the authorized spokesman of its membership" and "has sufficient interest in this litigation to pursue the matter vigorously and is in a position to bring the issues into sharp focus."

This principle that organizations can represent their members has been specifically applied to conservation groups. *Crowther v. Seaborg, supra,* 312 F. Supp. at 1205 (D. Colo.); *Sierra Club v. Hardin, supra,* D. Alaska, decided March 30, 1971 (2 Environment Reporter 1385); *White Lake Ass'n v. Whitehall,* Michigan Court of Appeals, decided February 27, 1970) (1 Environment Reporter 1383, 1386). Indeed, the court below upheld the right of conservation organizations to represent their members by finding that "local conservationist organizations made up of local residents and users of the area affected" could bring suit (R. 224).

Thus, individual American citizens have the right to sue to protect lands held in trust for them and organizations have standing to represent the rights of their members. The district court found, in upholding the allegations in the standing paragraph of the complaint, that the Sierra Club has been "regularly serving as a responsible representative" of persons interested in conservation and protecting the national game refuges, forests and parks of the country (R. 4, 197). Similarly, the First Annual Report of the Council on Environmental Quality which President Nixon sent to the Congress in 1970 states that the Sierra Club and other environment organizations "exist to inform, guide or represent their members in a wide variety of environmental and conservation matters" (p. 215). The Club therefore had standing to represent the interest of its members in protecting their rights in these invaluable lands held in trust for them.

4. *The Sierra Club Has Standing as an Organization Which Itself Uses Sequoia National Game Refuge, Forest, and Park and Represents the Interests of its Members Who Are Users of This Area*

Users of government lands clearly are injured and aggrieved when officials propose to use these lands for other purposes and therefore have standing (R. 224). Numerous other decisions have similarly upheld the standing of users. *Alameda Conservation Ass'n v. California, supra,* 437 F.2d at 1087, 1091-1092; *Parker v. United States,* 307 F. Supp. 685, 687 (D. Colo., 1969); *Crowther v. Seaborg, supra,* 312 F. Supp. at 1205; *Pennsylvania Environmental Council, Inc. v. Bartlett, supra,* 315 F. Supp. at 245; *EDF v. Corps of Engineers, supra,* D. D.C., decided January 27, 1971 (2 Environment Reporter 1173, 1174); *Sierra Club v. Hardin,* D. Alaska, decided March 30, 1971 (2 Environment Reporter 1385, 1392) ("Sierra Club and the Sitka Conservation Society have standing to assert the aesthetic conservational and recreational interests of local members and users who are directly affected").

The Sierra Club is itself a user of Sequoia National Game Refuge and Park. The Club runs and has run, virtually without interruption for over 60 years, camping trips into this area.[25] The Court of Appeals for the Ninth Circuit has expressly recognized in *Alameda Conservation Association v. California, supra,* 437 F.2d at 1091, that if a conservation organization has "a recreational operation which it conducted and which the defendants interferred with, it could assert it . . . ." The Sierra Club therefore has standing.

There can also be little doubt that the Sierra Club has among its members many users of the Sequoia National Game Refuge and Park. We have seen above (pp. 60-61) that

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[25] Testimony of H. M. Albright before the House Committee on Public Lands, February 26, 1920, on H.R. 5006, 66th Cong., 2d Sess. 69; 12 *Sierra Club Bulletin* 408 (1926); Sierra Club Handbook 24 (1969).

organizations have standing to represent the interests of their members if these members themselves have standing.

We do not believe that these simple facts are disputable. But if the government does dispute them or if it contends that these contentions are not encompassed within the standing allegations of the complaint (see R. 4), then the proper procedure is for this Court to remand the cause to the district court to allow the plaintiff to present evidence and to amend the complaint. For the plaintiff is clearly entitled to an opportunity to amend and to an evidentiary hearing before the action is dismissed.

5. *If This Court Finds that the Arguments Supporting Standing Are Insufficient, It Should Remand the Case to the District Court To Give the Plaintiff an Opportunity To Amend the Complaint and Present Evidence*

We have presented four alternative arguments supporting the standing of the plaintiff, the Sierra Club. The first contention—that the Sierra Club has standing as a national organization dedicated to preserving the environment—and the third contention—that the Sierra Club has standing as the representative of its members who, as American citizens, have the right to protect lands held in trust for them—plainly come within the allegations of the complaint (R. 4), and the district court's finding upholding these allegations (R. 197). The second contention—that the Sierra Club has standing as a local conservation organization with a special interest in the Sierra Nevada Mountains and particularly Mineral King and Sequoia National Park—is at the least, easily inferible from the complaint and findings. It is also supported by the legislative history of the statutes creating the National Game Refuge and Park (see pp. 23-29 above). The fourth contention—that the Sierra Club has standing as the representative of its members who use the area—is not supported by evidence of record.

Rule 8(f) of the Federal Rules of Civil Procedure provides that "all pleadings shall be so construed to do justice." Consequently, pleadings should be read liberally to attempt to sustain them. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506 (1959); *Ballou v. General Electric, Inc.*, 393 F.2d 398, 399 (C.A. 1, 1968). As this Court stated in *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957):

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" [Rule 8(a)] that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests . . . . Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other factual procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioner's complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one miss by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

In *Surawitz v. Hilton Hotels Corp.*, 383 U.S. 363, 374 (1966), this Court stated:

> The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they be on occasion. These rules are designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in Court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should

> as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits.

Read in this liberal spirit, the complaint would seem to encompass all the contentions we have raised.

Similarly, it is appropriate to recognize facts—which we believe the government will not dispute—concerning the character of the Sierra Club, its activities and members since this information is part of the legislative history of federal statutes, is otherwise a matter of public record, or is well known and undisputed. The record, like the complaint, should not be read narrowly at this early stage of the proceedings when there has not yet even been opportunity for an evidentiary hearing.

If the Court upholds standing, as we strongly urge, because the Sierra Club is a national conservation organization interested in protecting the environment, it need not go on to any of our other arguments. However, if standing is not found on the basis of that contention or of any other of the contentions which the Court finds are supported by the complaint and evidence in their present state, the cause should be remanded to the district court to allow the complaint to be amended and evidence to be presented on the other contentions.

Rule 15(a) of the Federal Rules of Civil Procedure plainly states that leave to amend "shall be freely given when justice so requires." Interpreting this rule, this Court stated in *Foman v. Davis*, 371 U.S. 178, 182 (1962):

> If the underlying facts and circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of the amendment, etc.—the leave should, as the rules require, be "freely given."

Accord, *e.g.*, *Maty v. Grassel Chemical Co.*, 303 U.S. 197, 200-201 (1938); *United States v. Hougham*, 364 U.S. 310, 317 (1960); *Nagler v. Admiral Corporation*, 248 F.2d 319, 322 (C.A. 2, 1957); *Middle Atlantic Utilities Co. v. S.M.W. Development Corp.*, 392 F.2d 380, 384 (C.A. 2, 1968); *Farkas v. Texas Instruments, Inc.*, 429 F.2d 849, 851 (C.A. 1, 1970).

This rule specifically applies when jurisdiction has been found to be lacking. 28 U.S.C. 1653 provides that "defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts" and the courts have held that this section should be liberally construed. *E.g.*, *Martin v. Ethyl Corp.*, 341 F.2d 1, 4 (C.A. 5, 1965); *John Birch Society v. NBC*, 377 F.2d 194, 198-199 (C.A. 2, 1967); *Cox v. Livingston*, 407 F.2d 392, 393 (C.A. 2, 1969). See also *Stern v. Beer*, 200 F.2d 794, 795 (C.A. 6, 1952); *Lemmon v. Cedar Point, Inc.*, 406 F.2d 94, 95, note 2 (C.A. 6, 1969); *Eklund v. Mora*, 410 F.2d 731, 732 (C.A. 5, 1969) (amendment after judgment). Similarly, plaintiff should have the opportunity to present evidence establishing its standing at a hearing on remand rather than have the factual issues determined on the basis of affidavits or documents alone.[26]

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[26] If the Court rejects all of the contentions we have made supporting the standing of the Sierra Club, we submit the cause should still be remanded to the district court to allow the joinder of additional plaintiffs with standing. As the court of appeals recognized (R. 224) and we have shown above (p. 62), users of the area plainly have standing. Just as plaintiffs can properly correct jurisdictional problems by amending the complaint, they can also correct any jurisdictional difficulty by joining a new plaintiff. *Hockner v. Guaranty Trust Co.*, 117 F.2d 95, 98 (C.A. 2, 1941). *Cf. Finn v. American Fire & Casualty Co.*, 207 F.2d 113 (C.A. 5, 1953) (jurisdiction perfected by dismissing two defendants after trial).

Any other course will simply produce more delay and burden both the parties and the courts. Other plaintiffs with proper standing are entitled to bring separate suit. The most fair and expeditious procedure for all the parties is to allow them to enter the present case which is already in process.

II

THE COURT OF APPEALS ERRED IN REVERSING THE GRANT OF A PRELIMINARY INJUNCTION BY THE DISTRICT COURT

The district court, on the basis of affidavits and supporting documents without an evidentiary hearing, issued a preliminary injunction against granting any permits for construction of the resort or highway (R. 220-201). The court reasoned that, without the injunction, defendants might "substantially chang[e] the existing situation.... [W]e find that plaintiff has raised questions, concerning possible excess of statutory authority, sufficiently substantial and serious to justify a preliminary injunction against both Agriculture and Interior pending trial of these issues on the merits or the further order of this court" (R. 198-199).

The court of appeals reversed (R. 208-235). It stated that in order to obtain a preliminary injunction, "the plaintiff must establish a strong likelihood or 'reasonable certainty' that he will prevail on the merits at a final hearing" (R. 224). The court then reviewed the merits of each claim and found "little or no likelihood of success in opposing the proposed development upon the ground that there would be an illegal use of term and revocable permits" (R. 230); that "[w]e cannot find in the [plaintiff's] contentions concerning this proposed road any degree of substantiality" (R. 231); "we accept the argument of the Secretary as convincing" concerning the electrical transmission line (R. 232); and "[w]e find no substance in this argument" relating to the project interfering with the Sequoia National Game Refuge (R. 234).[27] The Court concluded that plaintiff "has not shown with any degree of certainty that it will or can succeed. Neither has it shown that it, or its members or anyone else will suffer irreparable injury" (R. 234).

[27]The court of appeals similarly found that the issue of public hearings concerning the road through Sequoia National Park, an issue which we do not discuss, "cannot be considered a substantial factor in this proceeding" (R. 233).

This Court has held (*Frendergast v. New York Telephone Co.*, 262 U.S. 43, 50-51 (1923)):

> It is well settled that the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial court; and that, upon appeal, an order granting such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion.

Accord, *Alabama v. United States*, 279 U.S. 229, 231 (1929); *Mitchell v. Penny Stores, Inc.*, 284 U.S. 576 (1931); *United States v. Corrick*, 298 U.S. 435, 437-438 (1936); *Deckert v. Independence Shores Corp.*, 311 U.S. 282, 290 (1940); *Yakus v. United States*, 321 U.S. 414, 440 (1944). See 7 Moore, *Federal Practice* (2d ed., 1968), 1625, 1630-1631. Similarly, in *Chicago v. Fox Film Corp.*, 251 Fed. 883, 884 (C.A. 7, 1918), the court of appeals stated:

> A pendite lite injunctional order will not be reversed unless there was an abuse of discretion; and this can only appear from an obvious misunderstanding of the facts or a palpable misapplication of well-settled rules of law on the part of the trial judge.

As a result, there are "severe limitations" upon the scope of review of the courts of appeals. *Mytinger & Casselberry, Inc. v. Numanna Laboratories Corp.*, 215 F.2d 382, 384 (C.A. 7, 1954).

The broad discretion of the district court and the narrow review by the appellate courts reflect the nature of a preliminary injunction. A "preliminary injunction . . . is . . . interlocutory, tentative, provisional, and interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness." *Hamilton Watch Co. v. Benrus*, 206 F.2d 739, 742 (C.A. 2, 1953). The trial court is not supposed to determine the merits but instead merely to keep the status quo pending determination of the case. See pp. 76-78 below. The determination is usually based, as it was here, on affidavits without a full evidentiary hearing. It is assumed that, if there is no appeal, the merits will be tried promptly and a final determination made.

We submit that the district court properly exercised its discretion in this case. As we will show below, the district court's determination to issue an injunction is fully consistent with equitable principles. Plaintiff has raised serious legal and factual questions concerning the construction of a ski and summer resort in Sequoia National Game Refuge and Forest and of a highway and electrical transmission line in Sequoia National Park. If an injunction had not been issued, construction would have begun and the harm to the refuge, forest, and park would have been irreparable. In these circumstances, the district court properly exercised its discretion to prevent construction and to preserve the status quo.

A. The District Court Properly Issued The Preliminary Injunction To Preserve The Status Quo On The Basis Of Finding That Plaintiff Raised Substantial And Serious Issues

The district court issued the preliminary injunction in order to preserve the status quo because "[p]laintiff has raised questions, concerning possible excess of statutory authority, sufficiently substantial and serious to justify a preliminary injunction . . . ." (R. 199). The court of appeals reversed on the ground that a preliminary injunction requires the plaintiff to "establish a strong likelihood or 'reasonable certainty' that he will prevail on the merits at a final hearing" (R. 224). We submit that the district court and not the court of appeals applied the appropriate standard.

While this Court once stated that "[t]he right [to a preliminary injunction] must be clear" (*Truly v. Wanzer*, 46 U.S. (5 How.) 141, 142 (1847)), this Court has since refused to follow this rule. The Court has squarely held (*Ohio Oil Co. v. Conway*, 279 U.S. 813, 815 (1929)):

> Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable, if the application be denied and the final

> decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction will usually be granted.

Accord, *Alabama v. United States, supra,* 279 U.S. at 231. Similarly, in *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940), the Court held that, instead of deciding the merits, the district court should have decided only "whether the showing made raised serious questions" and whether failure to issue an injunction would result in irreparable injury.

Although the decisions of the courts of appeals are divided, most cases have held that the plaintiff need only raise a serious or substantial or grave question, at least if he shows that the injury to him will be irreparable if a preliminary injunction were not to issue. For example, in *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (1953), the Second Circuit held that if the plaintiff has shown irreparable injury, he need only raise "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." The decisions of the Third, Fifth and Eighth Circuits appear unanimously to support this rule.[28] The opinions of the Ninth Circuit, until the decision

[28]Third Circuit: *Railroad Yardmasters v. Pennsylvania R.R. Co.*, 224 F.2d 226, 229 (1955).

Seventh Circuit: *Selchow & Righter Co. v. Western Printing & Lithographing Co.*, 112 F.2d 430, 431 (1940) (must only show need to protect plaintiff from "great injury" without any "anticipated determination of issues"); *Mytinger & Casselberry, Inc. v. Numanna Laboratories Corp.*, 215 F.2d 382, 385 (1954).

Eighth Circuit: *City of Newton v. Levis,* 79 Fed. 715, 718 (1897); *Allison v. Carson,* 88 Fed. 581, 584 (1898); *Denver & R.G.R. Co. v. United States,* 124 Fed. 156, 161 (1903); *Love v. Atchinson, T. & S.F. Ry.*, 185 Fed. 321, 331-332 (1911); *Magruder v. Belle Fourche Valley Water User's Ass'n,* 219 Fed. 72, 82 (1914); *Council Bluffs v. Omaha & C.B. St. Ry. Co.*, 9 F.2d 246, 247 (1925); *Security Metal Products Co. v. Kawneer Co.*, 14 F.2d 569, 572-573 (1926); *Special School*

(continued)

below, also seem uniformly to support this rule and the court of appeals cited no Ninth Circuit decisions in support of its decision.[29] The decisions of the Fourth, Fifth, Sixth, Tenth, and District of Columbia Circuits are divided.[30] While two of the five decisions relied upon by the court of appeals below were from the Second Circuit, many of the earlier

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Dist. of Malvern v. Speer, 75 F.2d 420, 422 (1935); *Pratt v. Stout*, 85 F.2d 172, 176 (1936); *Benson Hotel Corp. v. Woods*, 168 F.2d 694, 697 (1948); *Missouri-Kansas-Texas R. Co. v. Randolph*, 182 F.2d 996, 999 (1950); *Chicago, B. & Q. R. Co. v. Chicago Great Western R. Co.*, 190 F.2d 361, 363-364 (1951); *Des Moines v. Continental Illinois Nat. Bank & Trust Co.*, 205 F.2d 729, 732 (1953).

[29]Ninth Circuit: *Northwestern Stevedoring Co. v. Marshall*, 41 F.2d 28, 29 (1930) ("the possibility that the plaintiff may make out a case on the merits"); *Ross-Whitney Corp. v. Smith Kline & French Laboratories*, 207 F.2d 190, 194 (1953); *Burton v. Matanuska Valley Lines, Inc.*, 244 F.2d 647, 650 (1957).

[30]Fourth Circuit: for:*Buskirk v. King*, 72 Fed. 22, 25 (1896); *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, decided April 6, 1971; against: *Sinclair Refining Co. v. Midland Oil Co.*, 55 F.2d 42, 45 (1932).

Fifth Circuit: for:*Massie v. Buck*, 128 Fed. 27, 31-32 (1904); *King Lumber Co. v. Benton*, 186 Fed. 458, 459 (1911); against: *Wooten v. Ohler*, 303 F.2d 759, 762 (consider, as one of several factors, probable ultimate outcome . . . or the likely ultimate holding).

Sixth Circuit: for: *American Federation of Musicians v. Stein*, 213 F.2d 679, 683 (1954), certiorari denied, 348 U.S. 873; against: *Crane Co. v. Briggs Mfg. Co.*, 280 F.2d 747, 749 (1960); *Garlock, Inc. v. United Seal, Inc.*, 404 F.2d 256, 257 (1968); citing both standards: *Blount v. Societe Anonyme du Filtre*, 53 Fed. 98, 101 (1892).

Tenth Circuit: for: *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 781-782 (1964); against: *Crowther v. Seaborg*, 415 F.2d 437, 439 (1969). District of Columbia: for: *National Lawyers Guild*

District of Columbia: for: *National Lawyers Guild v. Browneil*, 225 F.2d 552, 554 (1955), certiorari denied, 351 U.S. 927; against: *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489 (1968); *District 50, United Mine Workers v. International Union, United Mine Workers*, 412 F.2d 165, 167 (1969); *A Quaker Action Group v. Hickel*, 421 F.2d 1111, 1115 (1969).

and more recent decisions of that Circuit have followed the majority rule.[31]

The confusion in standards applied by the lower courts can largely be resolved. Several decisions have indicated that a showing of reasonable certainty is needed only where no irraparable injury exists. For example, *Unicon Manufacturing Corp. v. Koppers Co.*, 366 F.2d 19[illegible] 204-205 (1966), reconciled the two Second Circuit cases upon which the court of appeals relied with other Second Circuit decisions:

> We reaffirm our holding in H. E. Fletcher Co. v. Rock of Ages Corp., 326 F.2d 13, 17 (2 Cir. 1963), that the party seeking a preliminary injunction has a "burden of convincing [the court] 'with reasonable certainty' that it 'must succeed at final hearing.' Hall Signal Co. v. General Ry. Co., 153 F. 907, 908 (2 Cir. 1907)," where, as there, it appears that a "lack of adequate showing of irreparable damage" also exists. But we do not think that what was said in *Fletcher* is a departure from the more generally accepted statement of the rule that "it will ordinarily be enough that the plaintiff . . . has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." where, as here, "the balance of hardships" tips decidely toward the party requesting the temporary relief. Hamilton Watch Co. v. Benrus Watch Co., supra, 206 F.2d at 470.

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[31] Second Circuit: for: *Hadden v. Dooley*, 74 Fed. 429, 431 (1896); *Cone v. Rorick*, 112 F.2d 894, 896 (1940); *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740, 742 (1953); *Unicon Management Corp. v. Koppers Co.*, 366 F.2d 199, 204-205 (1966); *Dino de Laurentiis Cinematografica v. D-150, Inc.*, 366 F.2d 373, 375 (1966); *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205-1206 (1970); against: *Hall Signal Co.*, 153 Fed 907, 908 (1907); *Speeding Products v. DriMark Products, Inc.*, 271 F.2d 646, 648, (1959); *Societe Comptoir de L'Industrie Contonniere Establishments Boussac v. Alexander's Department Stores, Inc.*, 299 F.2d 33, 35 (1962); *H.E. Fletcher Co. v. Rock of Ages Corp.*, 326 F.2d 13, 17 (1963).

Accord, *Dino DeLaurentiis Cinematografica v. D-150, Inc.* 366 F.2d 373, 375 (C.A. 2, 1966). Two other courts have similarly explained that the requirements of "reasonable probability of success" and "a probable right" require, if irreparable injury is involved, only that "substantial issues" are raised and the plaintiff "is not embarked on frivolous litigation." *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 781-782 (C.A. 10, 1964); *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, C.A. 4, decided April 6, 1971.

Another group of decisions makes essentially the same point in different words. These cases hold (*Perry v. Perry*, 190 F.2d 601, 602 (C.A.D.C., 1951)):

> When a motion for a preliminary injunction is presented to a court in advance of hearing on the merits, it is called upon to exercise its discretion "upon the basis of a series of estimates: the relative importance of the rights asserted and the rights sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of the ultimate success or failure of the suit, the balancing of damage and convenience generally."

Accord, *Doeskin Products, Inc. v. United Paper Co.*, 195 F.2d 356, 358-359 (C.A. 7, 1952); *Industrial Bank of Washington v. Tobriner*, 405 F.2d 1321, 1324 (C.A. D.C., 1968). See also 3 Barron & Holtzoff (1958), pp. 492-493; Note, "Developments in the Law: Injunctions," 78 *Harv. L.Rev.* 994, 1056 (1965). These cases imply that a plaintiff, if he demonstrates irreparable injury to himself and not to the defendant, need only raise serious issues concerning important rights in order to obtain a preliminary injunction. They are thus consistent with the numerous other decisions cited above which state that a preliminary injunction can properly issue upon the showing of irreparable injury and the raising of serious issues.

The rule as determined by this Court and the overwhelming majority of decisions of the courts of appeals is firmly based on American and English history. In *Georgia v. Brails-*

ford, 2 U.S. (2 Dall.) 402 (1792), this Court reviewed a preliminary injunction issued by a circuit court against payment of funds pending determination to whom the money belonged. Mr. Justice Johnson would have reversed on the ground that "the bill should set forth a case of probable right. . . ." *Id.* at 405. Mr. Justice Blair, on the other hand, stated that (*id.* at 407):

> It appears to me to be too early, likewise, to pronounce an opinion upon the titles in collision, since it is enough, on a motion of this kind, to show a colorable title. The state of Georgia has set up her confiscation act, which certainly is a fair foundation for future judicial investigation; and that an injury may not be done, which it may be out of our power to repair, the injunction ought, I think, to issue, till we are enabled by a full inquiry to decide upon the merits of the whole case.

The preliminary injunction was upheld.

The English courts similarly uphold preliminary injunctions if a substantial issue is raised. In *Glascott v. Lang,* 3 My. & Cr. 451, 455 (1838), the Lord Chancellor stated:

> [F]or the purpose of an injunction, it is not necessary that the Court should find a case which would entitle the Plaintiff to relief at all events. It is quite sufficient if the Court finds . . . a case which makes the transaction a proper subject of investigation in a Court of Equity. . . .

The Lord Chancellor stated in *Great Western Ry. v. Birmingham and Oxford Junction Ry. Co.,* 2 Ph. Ch. 597, 602-603 (1848):

> It is certain that the Court will in many cases interfere and preserve property in *status quo* during the pendency of a suit, in which the rights to it are to be decided, and that without expressing, and often without having the means of forming, any opinion as to such rights. . . . It is true that the Court will not so interfere, if it thinks that there is no real question between the parties but seeing that there is a substantial question to be decided, it will preserve the

> property until such question can be regularly disposed of.

Accord, *Shrewsbury v. Shrewsbury and Birmingham Rly*, 1 Sim. (N.S.) 410, 426-427 (1851) (the court "must satisfy itself, not that the Plaintiff has certainly a right, but that he has a fair question to raise as to the existence of such a right").

This rule is also consistent with the purpose of the preliminary injunction. They are intended, as shown below (pp. 76-78), to preserve the status quo. Without the need for a showing of probable right or reasonable certainty of success, the determination whether to issue a preliminary injunction and thereby preserve the status quo can be made promptly. Protracted evidentiary hearings are less necessary and affidavits, document, and supporting memoranda of law will generally be sufficient.

This and other federal courts have held that a strong showing must be made before an order of an administrative agency can be stayed or enjoined. *Public Service Commission v. Wisconsin Telephone Co.*, 289 U.S. 67, 70-71 (1933); *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (C.A. D.C., 1958); *Eastern Airlines, Inc v. Civil Aeronautics Board*, 261 F.2d 830 (C.A. 2, 1958). However, these cases involve decisions made by administrative agencies after quasi-judicial proceedings at which the parties could be heard. Here, plaintiff was denied any kind of hearing (R. 48, 26) and the proceeding in the district court was the first in which plaintiff had the opportunity to challenge the legality of defendants' actions. In such situations, the courts have not distinguished between suits challenging actions of federal officials and actions of private persons and have generally held that only a serious or substantial question need be raised. *E.g., National Lawyers Guild v. Brownell*, 225 F.2d 552, 554 (C.A.D.C. 1955), certiorari denied, 351 U.S. 927 (Attorney General); *West Virginia Highland Conservancy v. Island Creek Coal Co.*, C.A. 4, decided April 6, 1971 (Forest Supervisor).

Applying these standards to this case, the district court's determination to issue an injunction was clearly correct. As we will see below, plaintiff was seriously threatened with irreparable injury. And whatever view may ultimately be taken of the merits, there can be no doubt that the questions plaintiff raises are important, substantial, and difficult.

B. The District Court Properly Found That Plaintiff Would Suffer Irreparable Injury If A Preliminary Injunction Were Not Issued

The district court found that, if the preliminary injunction were not issued, plaintiff would suffer "imminent and irreparable injury" because otherwise the defendants would be able to grant permits allowing the construction of the ski and summer resorts in Sequoia National Game Refuge and of the highway through Sequoia National Park (R. 198). The court of appeals concluded, without explanation, that there would be no irreparable injury (R. 234).

The principal function of a preliminary injunction is to preserve the status quo until the case can be fully investigated and determined. *E.g., Hamilton Watch Co. v. Benrus Watch Co., supra,* 206 F.2d at 742; *American Federation of Musicians v. Stein,* 213 F.2d 679, 683 (C.A. 6, 1954), certiorari denied, 348 U.S. 873; *Unicon Management Corp. v. Koppers Co., supra,* 366 F.2d at 204; 7 Moore, *Federal Practice* (2d ed., 1968), p. 1624. The preliminary injunction serves to ensure that, if the plaintiff ultimately prevails, he can obtain the relief to which he is entitled. As the court of appeals stated in *City of Newton v. Levis,* 79 Fed. 715, 717 (C.A. 8, 1897), if the court

> refused to issue the injunction, the property and business of the electric company . . . would be immediately destroyed. Its final decree, if it should be in his favor, would be utterly nugatory . . . . In other words, to grant the injunction was to preserve the property of all parties in status quo, and prevent

> substantial damage to anyone, whatever the final decree might be, while to refuse it was to permit the immediate destruction of the property of the electric company, . . . to allow the infliction of irreparable loss upon them, and to render the suit and its decision useless, if the final decree should be in favor of the appellee. There can be no question of the duty of the chancellor to issue an injunction under such circumstances.

Similarly, as the Court of Appeals for the Ninth Circuit itself stated in *Burton v. Matanuska Valley Lines, Inc.*, 244 F.2d 647, 650 (1957):

> Such [a preliminary] injunction preserves the status quo and protects plaintiffs from irreparable injury during the pendency of a suit until such time as the court may adjudge and finally determine the rights of the parties. Necessarily the court must presuppose that in the case at bar it *may* turn out that plaintiff will ultimately lose. . . . But this *possibility* does not compel a denial of a temporary injunction if proper showing be made therefor; otherwise a court, which necessarily requires time to reach a final determination, would have no way to protect a party who may suffer irreparable loss if the status quo be not preserved. Without this power to issue interlocutory injunctions, courts would be unable to make their final judgments effective, for the very right to be protected, or the subject of the action itself, might be destroyed irreparably during the period required to arrive at an ultimate determination of the action.

Accord, *e.g.*, *Benson Hotel Corp. v. Woods*, 168 F.2d 694, 696 (C.A. 8, 1948); *Flight Engineers International Ass'n v. American Airlines, Inc.*, 303 F.2d 5, 11-12 (C.A. 5, 1962); *Maas v. United States*, 352 F.2d 348, 352 (C.A. D.C. 1966). Thus the basic rule is that the court will issue a preliminary injunction to preserve the status quo, "the last uncontested status which preceded the pending controversy." *Westinghouse Electric Corp. v. Free Sewing Machine Co.*, 256 F.2d 806, 808 (C.A. 7, 1958). Accord, *Washington*

Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472, 476 (C.A. 9, 1969).

This case involves the classic injury which the preliminary injunction is designed to protect against. In *Erhardt v. Boaro*, 113 U.S. 537, 539 (1885), this Court said that it—

> is now a common practice in cases where mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, of the removal of coal, to issue an injunction.... The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings....

Accord, *Buskirk v. King*, 72 Fed. 22, 25 (C.A. 4, 1896). Only a few months ago, the Court of Appeals for the Fourth Circuit held that the construction of a road through a wilderness area threatens irreparable injury. "[R]estoration of what the Wilderness Act of 1964 and other enactments seek to protect may not be achievable for several generations." *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, decided April 6, 1971. Similarly, here, the actions of defendants in Sequoia National Game Refuge, Forest, and Park threatened the destruction permanently or at least for generations of the wildlife, natural beauty, and other features which the refuge, forest, and park were designed to protect.

There can be no doubt that the harm to the Sierra Club is the harm to the environment. If plaintiff has standing, as we contend above (pp. 29-63), to challenge the actions of defendants because their actions will allow despoiling of the environment, it necessarily follows that they are hurt by any harm to the environment which may result. They need not show direct economic injury; as this Court has held, plaintiff's interest "may reflect 'aesthetic, conservational and recreational' as well as economic values." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 154 (1970).

It is proper of course to consider the harm to the defendants and their interests from issuing a preliminary injunction as well as to plaintiff and its interests if an injunction is not issued. "A court of equity must exercise its discretion in such manner as to safeguard the interests of both parties, and . . . it is an abuse of judicial discretion to issue an injunction which permits one party to obtain an advantage by acting while the hands of the adverse party are tied by the writ." *Corica v. Ragen*, 140 F.2d 496, 499 (C.A. 7, 1944). "[T]he award [of a preliminary injunction] is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction. *Yakus v. United States*, 321 U.S. 414, 440 (1944). However, when the district court has balanced the interest of the parties, "[e]specially will the granting of the temporary writ be upheld when the balance of injury as between the parties favors its issue." *Prendergast v. New York Telephone Co., supra*, 262 U.S. at 51. Accord, *Security Metal Products Co. v. Kawneer Co.*, 14 F.2d 569, 572 (C.A. 7, 1926); *Pratt v. Stout, supra*, 85 F.2d at 172.

There can be little doubt that the balance of injury overwhelmingly favors the plaintiff. If the preliminary injunction had not been issued, the district court found that construction would have soon begun (R. 198). The harm to wildlife, natural beauty and other features of the national game refuge, forest, and park would have been severe. In contrast, the only harm to the defendants and the interests they represent is the delay from not being able to build the resort and highway immediately. And if they had not appealed the temporary injunction, the district court would probably have long ago made a final determination on the merits.

It is of course true that in weighing the injuries involved the courts must consider not only the direct interest of the parties but also the public interest. *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, C.A. 4, decided April

6, 1971; *Udall v. D.C. Transit System, Inc.*, 404 F.2d 1358, 1360 (C.A.D.C., 1968); 7 Moore, *Federal Practice, supra*, pp. 1628-1629. "Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginia Ry. Co v. System Federation,* 300 U.S. 515, 552 (1937); *Yakus v. United States, supra,* 321 U.S. at 441.

Here, however, the public interest is precisely the issue to be determined. Defendants claim that the construction of the ski and summer resort will further the public interest. Plaintiff claims that it is representing the public interest by defending a national game refuge, forest, and park from despoilment and by seeking to ensure that defendants do not violate federal statutes designed to protect these areas. In *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, C.A. 4, decided April 6, 1971, where a conservation organization was suing to protect a wilderness area from destruction, the court of appeals stated that "the special interest of Conservancy aligns it with the public interest." Similarly, here, there is no basis for allowing defendants to proceed to destroy these unique national resources in the name of the public interest when the very legality of their action is under challenge.

The courts have made clear that the discretion of the trial court concerning preliminary injunctions, which we have discussed above (p. 68) is particularly broad when the preliminary injunction is only intended to serve the status quo. "The granting of a preliminary injunction to protect and preserve an existing state of things from a seriously detrimental change, pending the determination of important and doubtful issues arising in litigation is so commonplace and ordinarily so much a manner within the trial court's discretion as to preclude a reversal on appeal, except for a clear abuse of discretion." *Des Moines v. Continental Illinois Nat. Bank & Trust Co., supra,* 205 F.2d at 732. "[A]ppellants object to the injunction for the very reason that it

prevents them from changing the status quo during the pendency of this suit. It is well settled, and properly so, that appellate courts will not interfere with injunctions of this limited effect except in the unusual case and for very persuasive reasons." *American Ice Co. v. Royal Petroleum Corp.*, 261 F.2d 365, 368 (C.A. 3). It is plain that the district court weighed the injury to the respective parties in this case and properly concluded that the irreparable injury threatened to the refuge, forest, and park justified issuing the preliminary injunction pending final determination.

III

THE CONSTRUCTION OF A SKI AND SUMMER RESORT IN THE SEQUOIA NATIONAL GAME REFUGE AND FOREST AND A HIGHWAY AND ELECTRIC TRANSMISSION LINE THROUGH SEQUOIA NATIONAL PARK VIOLATES FEDERAL STATUTES

The court of appeals in effect decided the merits in determining that there was no reasonable likelihood that plaintiff would prevail. The law is clear that statements and rulings of an appellate court on the merits in reviewing a preliminary injunction are not binding on the district court upon remand and that the district court, after an evidentiary hearing and careful deliberation, is free to make its own judgment. "[T]he decision of either the trial or appellate court in granting or denying the temporary injunction does not constitute the law of the case and will not estop the parties nor the court as to the law of the case." *Benson Hotel Corp. v. Woods, supra,* 168 F.2d at 693. Accord, *Council Bluffs v. Omaha & C. B. St. Ry. Co.*, 9 F.2d 246, 249 (C.A. 9, 1925); *Meiselman v. Paramount Film Distributing Corp.*, 180 F.2d 94, 97 (C.A. 4, 1950); 7 Moore, *Federal Practice, supra,* p. 1703. Consequently, it is arguable that this court need only reverse the determination below as to standing and to the preliminary injunction and remand the case to the district court for determination of the merits.

We submit, however, that this Court should consider the merits of this case. The court of appeals indicated its views so clearly on the merits that the district court is likely to be precluded from making an independent judgment. It is therefore almost certain that the rulings of the court of appeals concerning the relevant law will prevail either in the district court or in the court of appeals on a second appeal. Since this Court has granted the writ of certiorari on the merits as well as on standing, it would seem appropriate to consider these important legal issues at this time. Postponement of these merits until a likely new petition for a writ of certiorari by the plaintiff will only delay the conclusion of this litigation even further.

We therefore urge the Court to determine the major legal questions—those relating to the meaning of the relevant federal statutes. The district court and court of appeals have explored these legal, as contrasted to factual, questions and they are ripe for decision. These issues are intrinsically involved in the case and will not be avoidable on remand. If, as we believe, the court of appeals has erred, the district court and the parties should have the benefit of a proper interpretation of these statutes to guide the evidentiary hearing on remand.

Introduction

The starting point for analysis of the merits is the Constitution. Article IV, Section 3, clause 2 provides:

> The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States. . . .

Numerous decisions of this Court and lower courts have interpreted this clause to give Congress exclusive jurisdiction over the disposition of land or other property of the United States and to give no such power to the head of an executive agency without legislation by Congress. *E.g.*, *United States v. Gratiot*, 39 U.S. (14 Pet.) 336 (1841); *Royal Indemnity*

Co. v. United States, 313 U.S. 289, 294 (1941); *United States v. Nicoll*, 27 Fed. Cas. No. 15879, pp. 149, 150 (C.C., N.Y., 1826) (Mr. Justice Thompson); *United States v. Utah Power and Light Co.*, 209 Fed. 554, 557 (C.A. 8, 1913), affirmed, 243 U.S. 399; *Udall v. Oil Shale Corp.*, 406 F.2d 759, 764 (C.A. 10, 1969). Ordinary law concerning the sale or lease of private land does not apply. Laches, estoppel, and other equitable doctrines do not bind the United States by the acts of its agents unless Congress has authorized the agents to act. *E.g., Hart v. United States*, 95 U.S. 316, 318 (1877); *Utah Power and Light Co. v. United States*, 243 U.S. 389, 409 (1917); *Wilber Nat. Bank v. United States*, 294 U.S. 120, 123-124 (1935).

These cases reflect the concern that the United States must not be bilked by private parties of the public lands which, as we have seen (pp. 57-59), are "held in trust for all the people." *United States v. Trinidad Coal Co.*, 137 U.S. 160, 170 (1890). Today, there is again rising concern, this time based on the need to protect the remaining natural beauty, wildlife, and other resources of this country, to protect the public lands from disposal or despoilment. This concern is reflected in numerous recent Acts relating to air pollution, water pollution, open space, and, most particularly, the National Environmental Policy Act. That Act, *inter alia*, places on the Federal Government the responsibility to "preserve important . . . natural aspects of our national heritage." 42 U.S.C. 4331(b)(4). We therefore urge this Court to reaffirm its numerous early decisions in the light of present federal policy and require that officials of the United States demonstrate clearly their authority to allow the use of the public lands, particularly when, as in this case, these lands are in national game refuges, forests, or parks.

A. The Secretary of Agriculture Has No Authority To Issue a Permit Which Will Convert Sequoia National Game Refuge into a Ski and Summer Resort

We submit that the Secretary of Agriculture has no authority to allow the construction of a major ski and summer resort occupying 13,000 of the 15,000 acres in Sequoia National Game Refuge.

Sequoia National Game Refuge was established in 1926 by 16 U.S.C. 688 which specifically stated its purpose:

> [I]t is the purpose of this section to protect from trespass the public lands of the United States and game animals which may be thereon . . . . [T]he land included in said game refuge shall continue to be parts of the Sequoia National Forest and nothing contained in this section shall prevent the Secretary of Agriculture from permitting other uses of said lands under and in conformity with the laws and rules and regulations applicable thereto so far as may be consistent with the purposes for which said game refuge is established.

Consequently, it is clear that the Secretary has authority to issue term permits under 16 U.S.C. 497 and revocable permits under 16 U.S.C. 551[32] only so far as the other uses will protect the wildlife in the refuge.

Mineral King is virtually surrounded by Sequoia National Park and is integrally related to the park. When Mineral King was solely within Sequoia National Forest, the Sierra Club did not regard this protection as sufficient. John Muir specifically complained about the lack of care taken of the area. *Atlantic Monthly*, January 1898, p. 27. On the other hand, the Forest Service opposed including the area in the park because of mineral claims there. See pp. 25, 28 above. Sequoia National Game Refuge was created as a compro-

[32]We argue below (pp. 89-110) that the Secretary has no authority to issue so-called revocable permits for a major resort even in national forests which are not game refuges.

mise between putting the area in Sequoia National Park, under the administration of the Park Service, or excluding the area and leaving its administration under the Forest Service.

In 1921 the Sierra Club suggested that "[s]hould the three southern townships [near Mineral King] be removed from the park, steps should be taken to protect the deer and other game, which for thirty years, since the creation of the park in 1890, have enjoyed a full measure of Government protection." The Sierra Club repeated this suggestion in 1923 when the Forest Service was opposing the inclusion of the three southern townships and Mineral King in the park. In May 1923 the Sierra Club stated, "We feel that the retention of these three townships within the park is a matter of great importance, by means of the fact that large numbers of deer and other game, which live in the higher regions of the park during the summertime, make these three townships their winter home."[33]

The Sierra Club itself suggested the compromise with regard to Mineral King that it be made a game refuge. 11 *Sierra Club Bulletin* 324; Strong, *Trees or Timber, supra,* p. 44; R. Rep. No. 902, 69th Cong., 1st Sess. 2. One of the reasons for this suggestion was to protect the game in the area. "At the time that the question of eliminating these three townships was discussed, . . . an answer to this objection that the game would be without protection in the winter time, it was suggested that a game refuge, either State or Federal, might be established."[34]

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[33]A recent study by the Park Service indicates this migration still occurs: "The oft-repeated observation that these parks are not self-sufficient ecological islands but are markedly susceptible to outside influences, is well illustrated by changes in the animal life. These changes are accentuated by the animals' mobility . . . [T]he ecological interrelationships and ultimate results of such animal movements across park boundaries have received scarcely any detailed study." *Sequoia and Kings Canyon National Parks Natural Sciences Research Plan,* edited by Lowell Sumner, Dept. of the Interior, April 1966, p. 21.

[34]National Parks Association Bulletin #34, July 6, 1923.

The Forest Service agreed to this compromise. In 1924 Chief Forester Greeley testified, "There is one feature of the bill (H.R. 4095) which the Forest Service has asked Mr. Barbour to include and that is the creation of a Federal game preserve to cover this peninsula."[35]

Two years later Mr. Greeley again testified in support of the game refuge in the hearings which led to 16 U.S.C. 688:[36]

> Mr. Chairman: Will the game refuge be subject to grazing?
>
> Mr. Greeley: I think not. There may be a little grazing in there, but practically none.
>
> Mr. Chairman: You will not permit grazing in there?
>
> Mr. Greeley: No, sir; grazing ought to be excluded from the game refuge area.
>
> Mr. Chairman: What is the particular reason for segregating this and setting it aside as a game refuge?
>
> Mr. Greeley: In the first place we felt that the Mineral King area should be kept out of the park, because there is a considerable section of mineralized territory there that has been prospected and mined in a small way for a good many years. Now leaving that out of the park, you can readily appreciate that with the park boundaries surrounding this little peninsula of natural forest land, all but the little neck, it would be extremely easy to have poaching on park lands if hunting were permitted on national forest lands. Aside from that there is a very valuable deer herd in this region partly in the national forest and partly in the present park, and we think as a matter of game conservation it is desirable to enlarge somewhat the area subject to

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[35]Hearings on H.R. 4095 before the House Committee on Agriculture, February 27-28, 1924, 68th Cong., 1st Sess. 23.

[36]Hearings on H.R. 9387 before the House Committee on Agriculture, April 7, 8 and 10, 1926, 69th Cong., 1st Sess. 57-58.

> special protection. This is one of the big breeding grounds of deer for the whole southern Sierra region.

While the three southern townships were retained in the park, Mineral King still became a game refuge in the 1926 statute.

Thus, Congress accepted the compromise on the basis that the refuge would adequately protect wildlife. The Forest Service assured Congress before the national refuge was created that it would not even permit grazing in order to protect deer and other wildlife. Now the Forest Service has decided to reject unilaterally the compromise which was embodied in the plain language of Section 688. This language should be strictly construed particularly in the light of the national policy, adopted in the National Environmental Policy Act, to protect this country's remaining wildlife and unspoiled areas of great natural beauty. 42 U.S.C. 4321-4325.

Sequoia National Game Refuge is one of the few wildlife refuges created by Congress. Subsequently, in 1934, Congress passed 16 U.S.C. 694 which delegated to the President the power to create wildlife refuges. Section 694 provides that the President may establish "fish and game sanctuaries or refuges which shall be devoted to the increase of game birds, game animals, and fish of all kinds naturally adapted thereto . . . ." The Senate report on Section 694 stated:[37]

> The purposes of this bill are far-reaching and commendable. Over a period of years, the wildlife of this country has shown a marked decrease due to many causes, the most important ones being:
>
> 1. The advance of civilization which restricts the breeding and feeding grounds of our wildlife.

Thus, the purpose of wildlife refuges is to provide an area where wildlife are protected from the very kinds of activities which the Secretary intends to permit in this case.

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[37]S. Rep. No. 243, 73d Cong., 2d Sess. 1 (1934).

We submit that the construction of any substantial resort in a national game refuge violates Section 688. If an evidentiary hearing is provided, the Sierra Club would be able to demonstrate that the 30-year term permit, even if this were the only permit, would violate the statute because the construction and subsequent activities on this land alone would not be consistent with the wildlife refuge. In any event, we submit that even in its present state the record demonstrates that the combination of the term permit for 80 acres and the revocable permit for 13,000 acres would destroy the refuge.

The ski and summer resort will be on 13,000 of the 15,000 acres in the entire refuge (R. 31, 26, 81, 229-230) and will include accommodations for 3,310 visitors, 10 restaurants, shops, a theatre, 22 ski lifts, and many other facilities (R. 27, 31, 33, 51a-51b, 126, 130-131, 134). As many as 14,000 visitors a day will visit the resort and 17 million visitors a year (R. 28, 53a). The concentration of visitors will, by area available, be twice as great as presently in Yosemite National Park (R. 28). There will be a 5-story parking facility for 3,600 cars (R. 27), and an average of 4,550 automobiles will come daily to the area and 9,850 during peak months (R. 60). There will be "extensive bulldozing and blasting in most lower areas and extensive rock removal at high elevations," the "grooming and manicuring" of most slopes, and "possibly stream channel changing" (R. 32, 128).

Officials of the California Fish and Game Commission have stated "that in an extensive development such as the Disney proposal, considerable wildlife habitat would be lost and wildlife would suffer from human encroachment" (R. 30, 76). The Forest Service itself has found that damage to fish and wildlife will be "critical" (R. 131).

The Secretary has no authority to issue any kind of permit for activity inconsistent with the protection of wildlife. The Secretary has not even attempted a finding that the resort in this case will be consistent with the purpose

of the refuge. If, however, there is any doubt on this issue, the plaintiff should have the opportunity to introduce evidence in the district court to show that the resort will destroy the wildlife habitat and destroy the usefulness of the game refuge.

B. The Secretary of Agriculture Has No Authority To Issue a Permit To Build a Resort on 13,000 Acres of a National Forest

The Forest Service has made its determination to issue Walt Disney Enterprises two permits. First, it intends to grant a 30-year permit for 80 acres of land within both Sequoia National Refuge and Forest (R. 27-28, 166) pursuant to 16 U.S.C. 497:

> The Secretary of Agriculture is authorized . . . (a) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience or safety . . . .

We do not challenge the authority of the Secretary to issue this term permit insofar as Mineral King is considered as a part of the national forest. As we argued above (pp. 84-89), however, the term permit, as well as the revocable permit, is inconsistent with Mineral King's status as a national game refuge.

Second, the Forest Service intends to grant a purportedly revocable permit for 13,000 acres of land within Sequoia National Refuge and Forest (R. 27-28, 166, 229-230) pursuant to 16 U.S.C. 551:

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests . . . and he may make such rules and regulations and establish such service as will insure the

> objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction . . . .

We submit that neither this statute, as its language, history, and administrative construction demonstrate, nor the inherent authority of Secretary of Agriculture allow him to permit the construction of a ski and summer resort on 13,000 acres of land in a national forest. We further submit that 16 U.S.C. 497 precludes him from issuing permits for the use of more than 80 acres of national forest land for a resort.

1. *The Secretary Is Precluded by 16 U.S.C. 497 from Issuing a Permit for a Ski and Summer Resort on 13,000 Acres of National Forest Land*

We submit that the action of the Secretary of Agriculture in granting a permit for the construction of major, permanent facilities on 13,000 acres was an effort to circumvent the restrictions of the statutes limiting his authority to grant term permits in national forests. Besides 16 U.S.C. 497(a), which allows the Secretary to make 30-year term permits for 80 acres for hotels and resorts and under which he granted the permit in Mineral King, the Secretary can enter 30-year permits for 5 acres to construct homes or stores (*id.* at 497(b)); 80 acres for buildings for industrial or commercial purposes (*id.* at 497(c)); and 80 acres for buildings for education or other public use which are owned by governmental or nonprofit agencies (*id.* at 497(d)). He may also lease 2 acres without limitation of time for schools or churches (*id.* at 479) and "suitable spaces . . . near, or adjacent to, mineral, medicinal or other springs" for sanitariums or hotels (*id.* at 495). Thus, Congress has carefully specified the amount of land which can be used in national forests for the construction of permanent facilities including explicitly resorts.

The legislative history of 16 U.S. 497 makes clear that Congress did not intend to allow permits for resorts to extend beyond 80 acres. The Forest Service sought from Congress in 1914 authority to grant term permits without

limitation as to acreage. H.R. 13679, 63d Cong., 2d Sess., provided "that hereafter the Secretary of Agriculture may, when necessary for the purpose of increasing the public benefits or public use of the National Forests, rent or lease to responsible persons or corporations for periods of not to exceed 20 years, suitable spaces or portions of ground for the construction of summer residences, hotels, stores, or any structure needed for recreation or conveience." Congressman Howley stated that "this amendment went into the bill on the special recommendation of the Forest Service." 51 Cong. Rec. 4771.

Congressman Taylor objected to this section at hearings on the bill—"The trouble with making such a law is this. It shuts out a great many people." Hearings on H.R. 13679 before the House Committee on Agriculture, December 12, 1913, 63d Cong., 2d Sess. 304. The bill did not pass. The following year, Congress passed a statute giving the Forest Service the authority to grant term permits for hotels and resorts but limited the amount of land to 5 acres. 38 Stat. 1101.

H.R. 1809, which would have enlarged the authority of the Forest Service to grant permits for hotels and resorts to 80 acres, was introduced in 1947. 80th Cong., 1st Sess. C.M. Granger of the Forest Service testified that extensive activities could not be encompassed within 5 acres and that only a revocable permit could be given for additional land. He then went on (Hearings on H.R. 1809 before the House Committee on Agriculture, June 19, 1947, 80th Cong., 1st Sess. 3):

> Another type [of large acreage use] is the ski lifts which are installed under permits on many of our high country winter sports areas. The ski lift itself, extending up the hill, with suitable space at each end for necessary structures to operate it, and a place to sell tickets and what not—and on most of our winter sports areas we need two or three of those, and it is really better to have them all operated by the same concern under our supervision—and there the aggregate acreage will almost always exceed 5 acres.

> Well those are types of use which we feel are very desirable in the national forest, and under our present set-up, where the acreage exceeds 5, we have to split the permit, giving them one term permit under our existing authority for not more than 5 acres, and the rest of the undertaking has to be covered by the terminable type of permit, which is terminable at the discretion of the Chief of the Forest Service.

Mr. Granger therefore supported the increase in the amount of land which could be leased under a term permit to 80 acres to cover all such extensive activities as ski lifts.

In 1956, Congress responded to this problem by passing legislation allowing the Forest Service to grant term permits for as much as 80 acres for hotels and resorts. 70 Stat. 708, 16 U.S.C. 497. In doing so, Congress made clear that the term permit was intended to include all permanent facilities and not merely a portion of them. The letter of the Secretary of the Interior to the Chairman of the Senate Committee concerning the bill expressly states that S. 2216, which became 16 U.S.C. 497, "would meet needs to grant term permits up to 80 acres for such public and semi-public uses as landing fields, resorts, . . . and ski lifts . . . ." S. Rep. No. 2511, 84th Cong., 2d Sess. 3; H. Rep. No. 2792, 84th Cong., 2d Sess. 3 (1956). With respect to the issues in this case, there can be little doubt that Congress intended that ski lifts and all other facilities should be within the area of the term permit. Thus the so-called revocable permit to be granted by the Secretary of Agriculture violates the 80 acre limit placed by Congress on land in national forests for hotels and resorts.

2. *The Secretary Is Not Authorized by 16 U.S.C. 551 To Issue a Permit for a Ski and Summer Resort on 13,000 Acres of National Forest Land*

The court of appeals held that the Secretary of Agriculture had the authority to issue a revocable permit under 16 U.S.C. 551 (R. 227-228). That Section provides that the Secretary—

> shall make provisions for the protection against destruction by fire and depredations upon the public forests . . . and he may make such rules and regulations . . . to regulate their occupancy and use and to preserve the forests thereon from destruction . . . ."

This provision, on its face, is designed to require the Secretary to protect the forests and allows him to issue regulations to do so. It is not a grant of authority to allow major new uses or to allow an amount of land to be used far exceeding the acreage limitation specifically provided by Congress.

The history of 16 U.S.C. 551 supports this construction. In 1891, Congress gave the President authority to withdraw lands from the public domain for national forest reservations. 26 Stat. 1103, 16 U.S.C. 471. On February 26, 1896, President Cleveland exercised this authority by reserving thousands of acres which had already been homesteaded. Congress was concerned about the problem which resulted (165 Cong. Rec. 902):

> Mr. Carter: In consequence of the hasty and inconsiderate action thus pursued mining towns, villages, patented mining claims, and the homestead claims of actual settlers were included within a reservation and the people thus included were advised by the proclamation that any attempt to cut or to use any of the timber in or about their homes would be visited with the pains and penalties of law.
>
> Mr. Pettigrew: On the 22nd day of February, without any notice, . . . President Cleveland issued his proclamation embracing within the forest reservations 21,000,000 acres of public lands occupied by settlers. We had no notice, no chance to oppose or resist the creation of the reservation, and yet, under the law, the moment that reservation was created by Executive proclamation persons who cut a tree for fire wood or for any domestic purpose would be liable to indictment.

As a result, Section 551 was adopted. 30 Stat. 35. Section 551 thus was designed to give the Secretary of Interior (later the Secretary of Agriculture) authority to allow settlers to cut wood and to carry out other activities incidental to homesteading. Under its authority, for example, numerous permits have been issued for grazing. See *United States v. Grimaud*, 220 U.S. 506, 522 (1911); *Light v. United States* 220 U.S. 523, 537 (1911).[38] There is no suggestion that Congress intended this provision to allow the large-scale development of national forest land.

The interpretation of Section 551 by Congress, the courts, and administrative agencies immediately after its passage further confirms this construction. The Secretary of Interior continued after, as before 1897, to seek specific legislation from Congress, in order to allow railroads to cross national forest land. 30 Stat. 729; *id.* at 783; *Chicago, M. & St. P. Ry. v. United States*, 218 Fed. 288, 293-294 (C.A. 9, 1914), affirmed, 244 U.S. 351. The Court of Appeals for the Ninth Circuit stated that "[i]t must have been the view of Congress that without these enabling acts a railroad company had no right, under the act of 1875, to cross forest reserves; otherwise there was no need of their enactment." *Id.* at 294. Although Section 551 is earlier described in the decision (*id.* at 292), the court did not even think it was relevant enough in determining the authority of the Secretary of Interior to grant permits for railroad lines to mention it in that context.

As a result, in 1899, Congress passed a statute which allowed the Secretary of Interior to grant rights of way to railroads. 30 Stat. 1233. This Court stated that the reason for this statute is that the Secretary of the Interior was previously, "properly so, as we think," seeking separare legislation from Congress for each right of way. *Chicago, Mil-*

[38]Similarly, a more recent decision has upheld regulations of the Secretary of Agriculture promulgated under Section 551 which prohibited the operation of motorized vehicles in an area of a national forest designated as a primitive area. *McMichael v. United States*, 355 F.2d 283 (C.A. 9, 1965).

waukee, & St. Paul Ry. v. United States, 244 U.S. 351, 357 (1917). There would have been no reason for this statute if, in 1897, the Secretary of the Interior had been given authority to issue permits for the construction of facilities like a railroad line or resort.

Subsequently, in 1901, Congress passed a statute authorizing revocable permits for rights of way through national forests for electrical and telegraph lines, canals, ditches and other water conduits, and water plants, dams, and reservoirs. 31 Stat. 790, 16 U.S.C. 79. Large numbers of revocable licenses have been issued under this act and major enterprises have been constructed involving millions of dollars. 30 Att'y Gen. 263, 269 (1914). Again, if Section 551, passed in 1897, allowed the Secretary of Interior to grant revocable permits for such permanent construction as a resort, there would have been no need to pass a new statute allowing him to grant permits for other kinds of construction.

This Court, in 1910, directly construed Section 551. In upholding grazing regulations issued by the Secretary of Agriculture under that section, the Court emphasized that (*United States v. Grimaud, supra,* 220 U.S. at 516):

> The determination of such questions . . . was a matter of administrative detail. . . .
>
> In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation has its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions, Congress was merely conferring administrative functions . . . .
>
> . . . "[A]n owner may delegate to his principal agent the right to employ subordinates, giving them a limited discretion, so it would seem Congress might rightfully entrust to the local . . . [authorities] the determination of minor matters."

In concluding, the Court made the limited authority conveyed by Section 551 even more clear (*id.* at 523):

> The Secretary of Agriculture could not make rules and regulations for any and every purpose.... As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provisions to protect them from depredations and from harmful uses.

In 1914, Attorney General McReynolds issued an opinion interpreting the 1901 statute concerning electrical and telegraph lines, canals, water plants, and dams. While he specifically described the 1897 statute and the grazing permits granted under it, he made clear that construction of major facilities came only within the 1901 statute. 30 Att'y Gen. 263, 267, 268-269.

Finally, on February 1, 1962, Attorney General Kennedy issued an opinion, which is not yet reported, stating that 16 U.S.C. 551 gave the Secretary of Interior the authority to allow the construction of wagon roads across national forests. However, he again made clear that the 1899 act, not Section 551, authorized the building of railroad lines. While no reason for the distinction is given, a possible explanation is that railroads involve more major and less revocable construction than a wagon road.

The only authority inconsistent with this analysis is a single 1905 opinion of Attorney General Moody which is cited by the court below (R. 227, note 12). 25 Att'y Gen. 470. That opinion states that Section 551 permits the Secretary of Agriculture to grant a permit for a fish saltery, oil and fertilizer plant in a national forest. The opinion goes on to say that a term permit of over one year can be granted.

This opinion is clearly erroneous. Even defendants do not and cannot claim that Section 551 allows term permits to be granted. No other authority exists supporting major construction in a national forest except pursuant to specific statutory authorization. We submit that in the light of the language, history and other administrative interpreta-

tion of Section 551, this opinion is not persuasive. It particularly should not be followed in view of the subsequent passage of 16 U.S.C. 497 which specifically limited term permits to 80 acres.

The court of appeals relied principally on what it regarded as the administrative practice. It quoted (R. 228) from a 1956 House Report (H. Rep. No. 2792, 84th Cong., 2d Sess. 2 (1956)):

> The Department of Agriculture now has adequate authority to issue revocable permits for all purposes under the act of June 4, 1897 (16 U.S.C. 551).

See also S. Rep. No. 2511, 84th Cong., 2d Sess. 1 (1956). The court then said that "[t]he fact that the record discloses that there are now a total of at least eighty-four recreational developments on national forest lands in which there is such a combination of the term permit and the revocable permit is convincing proof of their legality" (R. 229).

We submit that this argument is without foundation. First, as we will show more fully below (pp. 106-110), the so-called revocable permit in this case is not truly revocable either in the law or in fact: (1) the permit cannot be revoked at the discretion of the government because a showing must be made either that the land is needed for a more important public service or the holder of the permit has acted unsatisfactorily (Forest Service Manual Section 2716.3(1) and elaborate administrative review is provided (*id.* at Section 1571.01; 36 C.F.R. 211.20-211.37); (2) it is unlikely, at the least, that the government would or legally could revoke a permit without reasonable cause which would economically destroy a 35 million dollar project constructed in reliance on permits issued by the government; (3) the structures to be built by the developer are permanent in nature; and (4) even if the permit were revoked, the land cannot be restored for the purpose, to protect wildlife, for which it is now dedicated.

Second, the administrative practice is too weak and inconsistent to support the burden placed on it. The administrative practice and construction immediately after a statute has

been enacted is entitled to principal reliance. *E.g., Houghton v. Payne,* 194 U.S. 88, 99-100 (1904); *Norwegian Nitrogen Products Co. v. United States,* 288 U.S. 294, 315 (1933). This case is not unlike *United States v. Leslie Salt Co.,* 350 U.S. 383, 396 (1956), where this Court said that "[a]gainst the Treasury's prior longstanding and consistent administrative interpretation its more recent *ad hoc* contention as to how the statute should be construed cannot stand." Here, as we have seen (pp. 94-96), both Congress and the executive (with only one ruling of the Attorney General to the contrary) construed the 1897 statute for many years not to permit the granting of permits for major construction in national forests. The much later practice of the Secretary of Agriculture ignoring the earlier construction is not entitled to significant weight.

Administrative practice must also be uniform and longstanding to be entitled to weight. *E.g., Iselin v. United States,* 270 U.S. 245, 251 (1926); *United States v. Missouri Pac. Ry.,* 278 U.S. 269, 280 (1929); *Louisville & N. R. Co., v. United States,* 282 U.S. 740, 757 (1931). We have seen that the practice here is not uniform. While we do not know how long the practice of issuing so-called revocable permits for major construction in national forests has existed, we do know that if it has existed for long, it was inconsistent with contemporaneous opinions of Attorneys General. See pp. 95-96 above.

Moreover, the practice of the Secretary of Agriculture is not part of a regulation, a ruling, or any considered construction of the statute. The Secretary's practice amounts to nothing more than an attempt to extend his authority beyond what Congress has granted him.

The courts have frequently refused to rely on such unauthoritative administrative practice. Recently, in *Investment Company Institute v. Camp,* No. 61 and 59, this Term, decided April 5, 1971, the Court refused to give weight to the Comptroller General's interpretation of a statute because, even though the interpretation was embodied in a regulation, "the Comptroller adopted no expressly articulated posi-

tion . . . as to the meaning and impact of the provisions. . . ." In *Baltimore & Ohio Ry. v. Jackson,* 353 U.S. 325, 330-331 (1957), this Court stated that "[i]t is true that administrative determination is entitled to weight . . . but here there has been no expressed administrative determination of the problem." Similarly, in *Toucey v. New York Life Ins. Co.,* 314 U.S. 118, 140 (1941), the Court refused to rely on an alleged administrative practice:

> We are not dealing here with a settled course of decisions. . . . Only a few recent and episodic utterances furnish a tenuous basis for the exception which we are now asked explicitly to sanction.

Accord, *Sanford's Estate v. Commissioner,* 308 U.S. 39, 52 (1939) (lack of published rulings); *United States v. San Francisco,* 310 U.S. 16, 31 (1940); *Nantahala Power & Light Co. v. Federal Power Commission,* 384 F.2d 200, 206 (C.A. 4, 1967), certiorari denied, 390 U.S. 945 (comments by the Commission and its staff).

Third, the only practice which has been called to the attention of Congress has been unclear at best. In 1947, C. M. Granger of the Forest Service testified before the House Committee on Agriculture that since resorts and other major activities could not be encompassed on 5 acres of land, as 16 U.S.C. 497 then provided, the Forest Service was granting revocable permits for additional land. Hearings on H.R. 1809, June 19, 1947, 80th Cong., 1st Sess. He therefore argued on behalf of a bill, H.R. 1809, which would have allowed term permits for resorts for 80 acres. When such a bill passed in 1956, Congress presumably believed that it was eliminating the need for revocable permits for resorts. 70 Stat. 708, 16 U.S.C. 497.

The single, unexplained sentence in the 1956 Reports is at best too unclear to show that Congress knew, and approved, of revocable permits for resorts. It is likely that the sentence means only that the Secretary has ample authority to issue revocable permits for temporary uses which do not require term permits. This interpretation of this sentence

is strongly supported by the letter of the Acting Secretary of Agriculture which is included in the Report and which states clearly that "[u]nder existing laws this Department has adequate authority to issue revocable permits for use for which long-term tenure is unnecessary or undesirable." H. Rep. No. 2792, 84th Cong., 2d Sess. 3 (1956); S. Rep. No. 2511, 84th Cong., 2d Sess. 3 (1956). Moreover, the Forest Services' own Manual states that revocable permits are "generally for use of short duration." Section 2711.2(5).

In 1967, the Subcommittee on Forests of the House Committee on Agriculture held extensive hearings on the permits granted in national forests. Hearings on Management Policies and Other Problems of the National Forests, June 13-16, 1967, 90th Cong., 1st Sess. Arthur Greeley, the Associate Chief of the Forest Service testified that 63,000 term and revocable permits had been issued; that 53,000 involved improvements of some kind; and that the types of uses included homes, airports, mills, schools, stores and ski tows. *Id.* at 4-5. Despite extensive discussion by the Forest Service and representatives of homeowners, there was no indication that the same permit holders had both term permits for the maximum amount of land allowed under Section 497 and revocable permits for additional land. While it was stated that over 11,000 so-called revocable permits were for homes (*id.* at 13), there was no suggestion that such revocable permits were for more land than the 5 acres permitted for homes pursuant to a term permit under Section 497. Indeed, since the Forest Service told the Subcommittee that it allowed prospective homeowners to choose either a term permit or a revocable permit at their option,[39] there is a strong suggestion that the revocable permits for homes were 5 or less acres.

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[39]Hearings before the Subcommittee on Forests of the House Committee on Agriculture, April 20, 1967, 90th Cong., 1st Sess. 14; *id.*, September 27, 1967, p. 10.

The court of appeals noted that "there are now a total of at least eighty-four recreational developments on national forest lands in which there is such a combination of the term permit and the revocable permit . . . ." (R. 229). However, many of these permits may involve situations where no major, permanent facilities have been constructed outside land subject to the 80-acre term permit. In any event, there is no indication that these developments have been called to the attention of Congress, let alone even implicitly approved. The existence of these permits, many in violation of law, cannot justify an additional attempt of the Secretary to dispose of federal forest land in excess of his authority.[40]

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[40]To the extent that substantial interests have grown up based on the Secretary of Agriculture's past action in granting so-called revocable permits for resorts and other major developments, this Court might desire to apply its construction of Section 551 prospectively.

The Court has increasingly in recent years limited its decisions in the field of criminal law prospectively, even though constitutional issues were involved, when the purpose of the new decision would not have been served by retroactive application, when law enforcement agencies had relied in good faith on prior decisions, and when there would have been a serious effect on the administration of justice. *E.g., Johnson v. New Jersey*, 384 U.S. 719, 726 (1966); *Stovall v. Denno*, 388 U.S. 293, 297 (1970). Applying these standards here, there would be little reason to hold that past revocable permits should be invalidated when major investments have been based in reliance upon them and any damage which has resulted to the national forests probably cannot be removed.

These same principles apply to civil cases. See *Linkletter v. Walker*, 381 U.S. 618, 627 (1965). This Court has long recognized that "[t]he past cannot always be erased by a new judicial declaration" (*Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374 (1940), and has often refused to apply decisions retroactively. *E.g., Gelpecke v. Dubuque*, 68 U.S. (1 Wall.) 175 (1863) (legality of bonds); *Douglass v. Pike County*, 101 U.S. 677, 687 (1880) (same); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (unconstitutionality of limiting voters in bond elections to property holders); *Phoenix v. Kolodziejski*, 399 U.S. 204, 214 (1970) (same); *Rabin v. Rowan Memorial Hospital*, 269 N.C. 1, 152 S.E. 2d 485, 499

(continued)

3. *The Secretary Does Not Have the Inherent Authority To Issue Permits Which Are Not Revocable in Law and in Fact*

a. Inherent Authority of the Secretary of Agriculture To Issue Revocable Permits

The court of appeals indicated that the sole authority of the Secretary of Agriculture to issue a so-called revocable permit came from 16 U.S.C. 551 and that he did not have any inherent authority to do so (R. 226). We agree that he has no inherent authority to issue any permits which are not revocable both in law and in fact. Numerous opinions of both the Attorney General and Comptrollers General make clear that federal officials have inherent power to issue only fully revocable permits for the temporary use of federal property.

In 1878, Attorney General Devens ruled that the Secretary of the Navy could allow the city of Chelsea to construct a sewer through the grounds of a naval hospital only if it is a "mere license" which "from its very nature, is revocable at all times either by himself, his successors, or any other officer of the United States having lawful charge of the property."

(1967) (overruling tort immunity of charitable hospitals). "Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma, supra*, 395 U.S. at 706. It is particularly clear that the construction of a statute by a federal agency can be made prospective if needed to prevent injustice. *Safarik v. Udall*, 304 F.2d 944, 950 (C.A. D.C., 1962), certiorari denied, 371 U.S. 901 (authority of Secretary of Interior to make change of construction of statute affecting oil and gas leases operative prospectively); see *National Labor Relations Board v. Majestic Weaving Co.*, 355 F.2d 854, 860-861 (C.A. 2, 1966); *Chicago v. Federal Power Commission*, 385 F.2d 629, 642 (C.A. D.C., 1967).

16 Att'y Gen. 152. Later, that year, Attorney General Devens described licenses previously authorized by President Lincoln and by one Major General Newton for two railroad rights of way in 1864 and 1869. 16 Att'y Gen. 205, 211-212. Both licenses specifically stated that they "may be revoked at any time by the Executive or the duly authorized agents of the War Department . . . ." *Id.* at 212. Similarly in 1893, Attorney General Miller approved a permit to build an irrigating ditch across a military reservation if it was "revocable at the will and pleasure of the Secretary of War" (19 Att'y Gen. 628, 629 (1890)) and concluded that the Secretary of Treasury "has power to revoke the license at pleasure" of a railroad on a lighthouse reservation (20 Att'y Gen. 527, 529 (1898)).

In 1897, Attorney General McKenna ruled that the War Department could not grant a permit for the construction of a chapel at West Point even if the permit was revocable and even though a statute allowed the Secretary of War to lease property pursuant to a revocable permit (21 Att'y Gen. 537, 538):

> It is not necessary to determine the character of estate which can be created under this section . . . . It seems certain that permanence of right is forbidden by it, and hence it would seem that an occupation which contemplated permanence . . . . is forbidden. A church ediface would seem to contemplate such occupation . . . . As a structure—with integrity preserved—it cannot be removed . . . .

The Attorney General then went on to state that (*id.* at 541):

> The licenses provide for no term, and really commit the Government to a practical perpetuity. It would be idle to deny this—idle to deny that you do not expect to exercise, nor is it expected that you will exercise, the power of revocation except in emergency. Indeed a contention, not without some authority, could be raised that you could not . . . . At any rate the Government would find itself embar-

> rassed either to endure a perpetuity of right in the license or exercise of invidious power.[41]

The Attorney General ruled that the permit was illegal even though he noted that permits for hotels and chapels had occasionally been issued before on army reservations. And later in that same year, he again ruled that a permit for a chapel, reading room, and library would be illegal. 21 Att'y Gen. 565, 566 (1897). See also 22 Att'y Gen. 240, 245 (1898) (Attorney General Griggs) (railroad right of way permit allowable as "a mere revocable license, subject to termination at any time at the will of the Government").

Similarly, in 1911, Attorney General Wickersham concluded that a "revocable license" could be given to lease buildings on naval stations in Puerto Rico but that it would not be proper, "even under the broadest limits of this doctrine, to permit the erection of improvements that would in fact be permanent." 29 Att'y Gen. 205, 207. Attorney General Gregory said that the Secretary of War could grant a permit for a street railway as long as "the occupancy permitted is, and is expressed and thoroughly understood to be, absolutely revocable and subject to termination at any time at the will of the Government . . . ." 30 Att'y Gen. 470, 482 (1915). The Attorney General then went on to say: "It need hardly be added that what I have said on this point has no application to a case when the use granted from its very nature would not be revocable, practically speaking, whatever it might be in form." *Id.* at 483.

This line of opinions was analyzed and summarized by Attorney General Sargent in 1928. 35 Att'y Gen. 485. He noted that many of the structures which had been licensed were permanent in character. "The essential thing is to pre-

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[41] Significantly, the Attorney General also stated that a statute, comparable to 16 U.S.C. 551, authorizing the heads of departments to issue regulations concerning the preservation of property appertaining to their departments, did not authorize the license. 21 Att'y Gen. at 538.

serve unimpaired the title of the United States and its right at any time to occupy and use its property and to prevent any use by the licensee which would permanently damage or destroy the property for government use." *Id.* at 489. The opinion then laid down three requirements for permits as consistent with all the earlier opinions of Attorneys General (*ibid.*):

> (1) the permits are made expressly revocable at will, (2) the structures which the licensee proposes to erect are capable of being removed in case of revocation, and the use to which the licensee proposes to put the land will not permanently damage or destroy it for Government use, (3) the granting of the permit and the use of the property under it will be of direct benefit to the United States.

He then stated that a permit for a railroad right of way must "expressly provid[e] that it may be revoked at any time at the pleasure of the Secretary of War" and "for the removal of all structures by the permittee, and for leaving the property in suitable condition for the Government use . . . ." *Id.* at 490.

Based on similar principles, the Comptroller General has issued opinions that "in the absence of specific statutory authority therefor, Government officers . . . may not legally rent Government-owned property, buildings, or parts of buildings to private parties . . . ." (14 Comp. Gen. 169, 170 (1934); that a license can be made, terminable at 30 days' notice, to plant and cultivate government land (22 Comp. Gen. 563 (1942); that a contractor may obtain the use of government-owned drawings only through a nonexclusive, revocable license (25 Comp. Gen. 909, 911 (1946)). See also 36 Comp. Gen. 561, 563-564 (1957).

These rulings are based squarely on the Article IV, Section 3, Clause 2 of the Constitution. *E.g.*, 34 Att'y Gen. 320, 322-323 (1924); 14 Comp. Gen. 169, 169-170 (1934); 15 Comp. Gen. 96, 97 (1935); 25 Comp. Gen. 909, 911 (1946). As Attorney General Stone stated, after first review-

ing cases of this Court construing this provision (34 Att'y Gen. 320, 322-323):

> It follows, then, that property once acquired by the Government may not be sold, or title otherwise disposed of, except under the authority of Congress, and in the manner provided by law, and this prohibition extends to any attempt to alienate a part of the property, or in general, in any manner to limit or restrict the full and exclusive ownership of the United therein . . . . [I]t has been fully established that Congress is the only authority to be invoked, where there is, in fact, an alienation or what amounts to a transfer or surrender of Government property, by which the title, control or possession of the Government is lost, reduced or abridged. This authority may be generally expressed, or may be specifically granted to permit the disposition in whole or in part of particular property rights. But until that power is given by Congress, expressly or implicitly, the Executive is without power to act.

The Attorney General concluded that a non-exclusive revocable license for a government-owned patent could be made by the Department of the Navy only because such a license "passes no possession of anything tangible, nor reduces the only right granted in a patent . . . ." *Id.* at 329.

Thus, the inherent power of the Secretary of Agriculture in this case must be strictly construed. His authority to grant permits, without express statutory authorization, is merely an exception to the general rule, required by the Constitution, that only Congress can dispose of government property. The exception exists only when the executive branch is in effect not disposing of anything because the license is fully revocable at will and the property of the government can be completely restored.

b. The Lack of Revocability of the Permits in This Case

It is clear, under the standards described above, that the permit granted by the Secretary in this case is not revocable either in law or in fact.

First, the Forest Service Manual provides that annual permits "will be limited to the time actually needed for exercising the use privileges." Section 2711.1-4. Obviously, the 22 ski lifts, a 5-story parking facility for 3,600 vehicles, refuse and sewage facilities, service roads and other facilities on the 13,000 acres covered by the so-called revocable permit (R. 15, 23, 31, 191-192, 229-230) are "actually needed" for the same period of time as the resort as a whole. Since the term permit is for 30 years for the 80 acres on which the alpine village is located, the Manual would seem to give the developers the right to retain the 13,000 acres for an equal amount of time. This construction is supported by the fact that the permit itself does not mention its duration but only states that payment for th permit is to be made anually (R. 23).

Second, the Forest Service Manual states that (Section 2716.3.2):

> Annual permits may be revoked only by an officer superior in rank to the issuing officer:
>
> (a) When there has been a break of the conditions of the permit . . .
>
> (b) At the discretion of the Forest Service; however, this discretion will normally be exercised only:
>
> (1) when the land is needed for more important public purposes, or
>
> (2) when the present use has become unsatisfactory or undesirable.

While the permit itself provides that it "may be terminated upon breach of any other conditions herein or at the discretion of the regional forester or the chief, Forest Service" (R. 24), it seems clear that the developer has all the rights afforded to all permit holders by the Manual.

The holder of the permit has the right to an elaborate review procedure before the permit can be revoked to assure that the criteria in the Manual are complied with. The determination to revoke the permit can be appealed as a matter of right to the Board of Forest Appeals which is

required to hold a quasi-judicial hearing. 36 C.F.R. 211.24. The Board's decision is then reviewable in the courts. *Id.* at 211.25.

Under the Manual and regulations, the Forest Service could only revoke the permit for cause—namely that the land is needed for a more important public purpose or that the owner has used it in an unsatisfactory or undesirable manner. If the Forest Service did attempt to revoke the permit, it is likely that the developer could obtain review not only within the Service itself but in the courts to determine whether the criteria for revocation in the Manual were met. Certainly, the Manual and regulations do not even suggest that the permit could be revoked in the complete discretion of the Forest Service as numerous opinions of the Attorney General require for revocable permits.[42]

Third, most of the opinions of the Attorney General described above conclude that a revocable permit may not be issued if major, permanent structures are to be built. While railroads, electric lines, sewers, and similar facilities may be built, buildings have generally not been permitted. Attorneys General have repeatedly ruled that, even if a permit was legally revocable, it was not revocable in fact when the permit provided for constructing a building. 21 Att'y Gen. 537, 541; 29 Att'y Gen. 205, 207; 30 Att'y Gen. 470, 482; contra, 35 Att'y Gen. 485, 488-489. This same principle was stated by Attorney General Miller in saying that the Secretary of War could not give the State of Oregon a permit to operate a government-built railroad in return for the State constructing facilities needed to operate the railroad (20 Att'y Gen. 93, 95 (1891)):

> The state is to render a valuable consideration for the use of the railway, and it is not reasonable to suppose that it was intended that the State should

[42] Since, as we have shown above (p. 83), the government is not bound by the unlawful acts of its agents, we believe that the Manual and regulations need not be followed and the government can revoke these permits at will. However, at the least, the Manual and regulations seriously interfere with the full discretion of the government to revoke.

> hold its rights at the mere sufferance of the United States. The effect, then, of the arrangement would be to give the State a *vested right* to operate the railway . . . .

The Forest Service has been revoking supposedly revocable permits of homeowners in national forests in order to use the land for public recreation areas. In doing so, it is significant that the Service has been giving 10 years' notice. Hearings before the Subcommittee on Forests of the House Committee on Agriculture, September 27, 1967, 90th Cong., 1st Sess. 2. This strongly supports our contention that once structures have been built on land, permits are no longer revocable in fact at the full discretion of the forest officials even if they may be in law.

In this case, Walt Disney Enterprises will spend 35 million dollars on this development (R. 27, 53a). It will build 22 ski lifts, a 5-story parking facility for 3,600 vehicles, refuse and sewage facilities, service roads, and perhaps other facilities on the 13,000 acres subject to the so-called revocable permit (R. 15, 23, 31, 191-192, 229-230). All the land, certainly not just the 80 acres under the term permit, is needed by the developer since, as the district court found (R. 141-192):

> It is inconceivable that Agriculture would, or could under the terms of the "revocable" permit and the circumstance of its issuance, suddenly and "at will" require the Developer to remove ski lifts, refuse and sewage facilities, parking areas and roads covered by that permit and thus effectively destroy the 35 million dollar investment made by the Developer under his 30 year-80 acre term permit.

It is thus clear that, even if the language of the Forest Service Manual supported the contention that the permit is revocable, in fact this permit is not revocable in the complete discretion of the Secretary of Agriculture.

Finally, Attorney General Sargent ruled that a revocable permit may be issued only if all structures may be removed

without permanently damaging the land for government use. 35 Att'y Gen. 485, 489 (1928). While the permit in this case would require the developer, upon revocation of the permit, to remove the structures and restore the site (R. 16), restoration of the site will be impossible. The developer proposes to build major facilities all over the area. There will be "extensive bulldozing and blasting in most lower areas and extensive rock removal at high elevations" and "a great deal of earth and debris removing" (R. 32, 128). The physical scars of this use could not be removed for generations, if ever. And the damage to the use of the land as a wildlife refuge, the use which has been prescribed by Congress, would continue long into the future. See p. 88 above.

For all these reasons, the permit in this case for the use of 13,000 acres of land is not truly revocable. The court of appeals implicitly agreed by stating that the authority of the Secretary to grant this permit did not come under the authority of executive agencies to grant fully revocable permits but rather under 16 U.S.C. 551 (R. 227-228). Thus, the permit for use of 13,000 acres cannot be granted by the Secretary of Agriculture without authority from Congress. And, as we have seen above, no such authority has been granted. In short, this record demonstrates that the 13,000 acre permit is not revocable, does not come within any statutory or other authority of the Secretary of Agriculture, and violates 16 U.S.C. 497.

C. The Secretary of Interior Has No Authority To Allow a Major Highway To Be Constructed Across Sequoia National Park Which Will Harm the Park and Which Will Be Solely Used To Allow Visitors To Travel to a Commercial Resort Outside the Park

Testimonials to the superb beauty of Sequoia National Park are abundant. Franklin Lane, Secretary of the Interior testified in 1919 in regards to Sequoia National Park that "I think perhaps the lovers of high mountain scenery regard

this as the choicest place in the whole United States."[43] The Park Service states of this park: "This is a vast region of unbroken wilderness, of mountains, canyons, rivers, lakes, and meadows . . . where you can find the unspoiled and spectacular natural scene."[44] The National Parks Association stated in 1921 about the proposed park: "We shall have added to our National Park System an area which, for the wide variety of its forest canyon and mountain exhibits and the impressive climaxes it contains of each kind, surely surpasses any other area of any kind in the United States. The hugest trees, the deepest and wildest valleys, the broadest sea of snow capped peaks, and the loftiest mountains are right here. It will be literally the national park of superlatives. Perhaps the whole world of scenery crowds as many and as diversified capital features into no other single region."[45]

Undoubtedly because of its superlative qualities Congress has taken a special interest in Sequoia National Park. The Park was the second national park created in 1890 only after Yellowstone. Congress has passed a series of special statutes relating only to Sequoia National Park (16 U.S.C. 43, 45a-1, 2, 3, 45b, 45c, 45d, 45e) and others relating only to Sequoia and Yosemite (16 U.S.C. 57, 58, 60, 61, 62, 63, 64, 65, 78, 79).

The Secretary of Interior authorized, after considerable reluctance (R. 65, 136, 139), the construction of a major, high-speed highway across 9.2 miles of Sequoia National Park (R. 54, 62-63, 65, 161, 187). The present road is a narrow, twisting, dirt road which now handles an average of only 95 cars daily and is inadequate to carry a large number of automobiles (R. 28, 63, 144). While the new highway

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[43]Hearings on H.R. 10929 before the House Committee on Agriculture, January 21, 1919, 65th Cong., 3d Sess. 14.

[44]*Sequoia and Kings Canyon*, National Park Service Pamphlet, p. 8 (rev. 1968).

[45]National Parks Association Bulletin # 23, Dec. 14, 1921, p. 1.

will have the same terminus points, it will be on an almost entirely different alignment (R. 61). The roadbed will be 28 feet wide at a minimum (R. 148), have a third lane for passing in many places (R. 54, 61), and have embankments of up to 800 to 1000 feet (R. 148). It will carry an average of 4,550 automobiles a day and 9,850 at peak periods (R. 60). It is likely, based on predictions of use of the resort, that the highway will not carry the traffic adequately and further construction will be needed (R. 136-138, 155-157).

The road connects a state highway with a commercial resort (R. 161). It is intended, as the district court found, to serve the resort (R. 149; see R. 54, 58, 140, 143) since the National Park Service has no plans to develop the area of the Park near the highway (R. 36). The route across the park is not the only route to the planned resort, but it is the cheapest (R. 66).

There is considerable danger that the highway will seriously harm the park. A consultant to the Park Service concluded that the road will be a barrier to wildlife such as deer, wolf, mountain lions, bear and horn sheep. "The retention and control of these species would be affected if relatively free movement up and down their slopes was not maintained" (R. 143). The Park Service has expressed fears about the effect of the road on Sequoia trees (R. 62, 67) and a consultant to the California Division of Highways found that 45 Sequoias "are in a position of possible jeopardy because of road construction" (R. 85, 123).

There is no dispute that the Secretary of Interior generally has authority to construct roads in national parks. 16 U.S.C. 8 provides:

> The Secretary of the Interior, in his administration of the National Park Service, is authorized to construct, reconstruct, and improve roads and trails . . . in the national parks . . . .

However, this construction must comply with other applicable federal statutes.

We submit that the construction of a major highway across Sequoia National Park violates federal law for two reasons. First, the highway will cause serious damage to the natural beauty, giant sequoias and wildlife in the park and is therefore inconsistent with federal statutes requiring the Secretary to protect the park. Second, the sole purpose of the highway is to get visitors to a commercial resort outside the park and is therefore inconsistent with federal statutes requiring the Secretary to use park land only for park purposes.

1. *The Proposed Highway May Not Be Constructed Because It Seriously Threatens the Park*

Congress has passed three separate statutes requiring, not simply authorizing, the Secretary of Interior to adopt rules and regulations to protect the park. 16 U.S.C. 43, 45b, 61.

16 U.S.C. 43, first adopted in 1890 when the park was created, now states:

> Sequoia National Park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be to make and publish such rules and regulations as he may deem necessary or proper for the care and management of the same. Such regulations *shall* provide for the preservation from injury of all timber, mineral deposits natural curiosities or wonders within said park, and their retention in their natural condition. (emphasis added)

In 1926, when the park was enlarged, Congress passed 16 U.S.C. 45b:

> The said park shall be under the exclusive control of the Secretary of Interior, whose duty it shall be as soon as practicable, to make and publish such reasonable rules and regulations . . . as he may deem necessary or proper for the care, protection, management, and improvement of the same, such regulations being primarily aimed at the freest use of said park for recreation purposes by the public and for the

> preservation from injury or spoliation of all timber, natural curiosities, or wonders within said park and their retention in their natural condition as far as practicable, and for the preservation of said park in a state of nature . . . . Such rules and regulations shall provide against the destruction of wild life within said park . . . .

Finally, 16 U.S.C. 61, added in 1920 (41 Stat. 732), provides as to both Sequoia and Yosemite National Parks:

> [T]he Secretary of the Interior shall make and publish said general rules and regulations as he may deem necessary and proper for the management and care of the park and for the protection of the property therein, especially for the preservation from injury or spoliation of all timber, mineral deposits . . . , natural curiosities or wonderful objects within said parks . . . .

Similarly, 16 U.S.C. 1 which created the National Park Service and which applies to all national parks provides that:

> [T]he service . . . shall promote and regulate the use of the Federal areas known as national parks . . . by such means and measures as conform to the fundamental purpose of the said parks . . . which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

Congress has recently reiterated, almost in identical language, that this is the purpose of the national parks. 16 U.S.C. 20; S. Rep. No. 1495, 85th Cong., 2d Sess. 1 (1958).

Congress has also recently expressed, in creating a unified national park system, a strong national policy in protecting the national parks (16 U.S.C. 1a-1):

> Congress declares that the national park system . . . has . . . grown to include superlative natural, historic and recreation areas in every major region of the United States . . . ; that these areas, though distinct in character, are united through their inter-

> related purposes and resources into one national park system as cumulative expressions of a single national heritage; that, individually and collectively, these areas derive increased national dignity and recognition of their superb environmental quality through their inclusion jointly with each other in one national park system preserved and managed for the benefit and inspiration of all the people of the United States . . . .

It is therefore clear that Congress intends that federal statutes designed to protect the national parks be strictly construed and applied. These statutes are plain that the Secretary must ensure that all activities within the park, including roads, must be consistent with preserving the natural beauty, trees, and wildlife in the park.

The history of the park demonstrates that the Secretary has no authority to allow the construction of a major highway across the park to a commercial resort. When Congress was considering a bill to enlarge the park in 1926, Congressman Rankin asked Congressman Barbour, the sponsor of the bill to enlarge the park: "How about roads and driveways through it?" Mr. Barbour replied, "I will say to the gentlemen it is proposed to make this a trail park and keep it a trail park. The roads now leading into the park go into the Giant Forest of the present park." 67 Cong. Rec. 19143. Mr. Barbour was not quite correct because a narrow road to Mineral King had existed even before the park was created (R. 28). Since that time, only Generals Highway has been added to connect General Grant Grove with other parts of Sequoia National Park. Consequently, until now, the intention of Congress has been observed that Sequoia National Park remain essentially a trail park.

This history shows that Congress intended the statutes which protect the national parks generally and Sequoia National Park particularly to protect Sequoia National Park from even the kind of roads which existed as of 1926. Clearly, Congress intended to prohibit the kind of major, high-speed highway which is now planned.

Congress has also adopted strong Federal policies with regard to protecting parkland from highways in the Department of Transportation Act of 1966 and Federal Aid to Highway Act of 1968. 49 U.S.C. 1653(f); 23 U.S.C. 138. While these policies were adopted in the context of federal highways, in contrast to the state highway in this case, they strongly support strict interpretation of the statutes, upon which we rely, relating to protection of the national parks. For there is every reason to believe that Congress intends even greater protection of the national parks than of other kinds of parkland.

We submit that the evidence in this record is adequate to demonstrate that this highway, particularly since it serves no park purpose, so seriously threatens the park that the Secretary of Interior has no authority to permit its construction. If, however, this Court finds that this issue is not clear, we submit that plaintiff is at least entitled to present evidence in the district court.

2. *The Proposed Highway May Not Be Constructed Because It Serves Commercial Non-Park Purposes*

It is also clear that all activities in the park must be designed to assist visitors in enjoying the park itself. 16 U.S.C. 41, which created the park states that it is "dedicated and set aside as a public park, or pleasure ground, for the benefit and enjoyment of the people. . . ." 16 U.S.C. 466 provides that the Secretary shall make regulations "primarily aimed at the freest use of said park for recreation purposes by the public. . . ." 16 U.S.C. 1 requires the National Park Service to regulate the use of all the national parks to "conform to the fundamental purpose" to provide for the enjoyment of "the scenery and the natural and historic objects and the wildlife therein." There is no authority for allowing park land to be used simply to get to a commercial resort.

As an earlier Secretary of the Interior defined his duties, "Every activity of the [Park] Service is subordinate to the duties imposed upon it to faithfully preserve the parks for posterity in essentially their natural state. The commercial use of these reservations, except as specially authorized by law, or such as may be incidential to the accommodation and entertainment of visitors, will not be permitted under any circumstances."[46]

A House report has recently specifically stated that 16 U.S.C. 8, upon which the Secretary relies for his authority to build roads in national parks, does not allow construction of highways for non-park purposes. In reporting a bill creating Padre Island National Seashore (16 U.S.C. 459d), Congress said that the Park Service could only build roads to allow the public to visit the area (H. Rep. No. 2179, 87th Cong., 2d Sess. 5 (1962)):

> The National Park Service already has authority to construct within any area which it administers such roads and trails as are needed for public use of the area (. . . 16 U.S.C. 8). The committee is of the opinion that to require the National Park Service to construct a through highway for general public convenience in the Padre Island National Seashore would give it a function which does not properly belong to it. . . .

The Department of Interior has itself determined that roads cannot be constructed in national parks for purposes such as those in this case (Park Road Standards, U.S. Department of the Interior, National Park Service, May 1968) (R. 37)):

> Park roads are not continuations of the State and Federal network. They should neither be designed—nor designated—to serve as connecting links. Motorists should not be routed through park roads to reach ultimate destinations.

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[46]Franklin Lane, "Statement of National Park Policy," 1918, as quoted in Farquhar "Legislative History of Sequoia and Kings Canyon National Parks," *supra*, p. 48.

Only a few years ago, in 1965, Congress passed a statute designed to protect national parks from damage caused by the construction of facilities even for park visitors. 16 U.S.C. 20. After restating "the fundamental purpose [of national parks] of conserving their scenery, wildlife, natural and historic objects," Section 20 went on:

> [T]he Congress hereby finds that the preservation of park values requires that such public accommodations, facilities and services as have to be provided within those areas should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that the heavy visitation will not unduly impair those values and so that development of such facilities can best be limited to locations where the least damage to park values will be created. *It is the policy of the Congress that such development shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located* and that are consistent to the highest practicable degree with the preservation and conservation of the areas (emphasis added).

This statute applies to highways as facilities or services which can seriously harm the park. Since the statute limits even highways and other facilities and services for visitors of the park itself, it *a fortiori* applies to a highway not even serving the park. Indeed, the statute specifically prohibits such a highway by prohibiting the development of facilities and services not "limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located. . . ."

Similarly, the Secretary of Interior may only "grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks. . . ." 16 U.S.C. 3. Just as he could not allow a hotel to be built in the park to accommodate visitors to the commercial resort at Mineral King, he cannot allow the building of a highway across park park land for this purpose.

The court of appeals held that the proposed highway could be built because a road already exists across the park to Mineral King (R. 231):

> We know of no law and find little logic in a contention that a twisting, substandard, inadequate road through 9.2 miles of the park is legal but that an improved all weather two lane highway . . . is illegal.

However, the existing road was in existence before the park was created (R. 28). It is a narrow, twisting, oiled dirt road which now carries an average of 95 vehicles a day; it could not handle anywhere near the number of vehicles as the proposed modern, high-speed highway (R. 28, 60, 144, 187). The authority to retain an existing road of this type in no way implies that the Secretary of Interior has the right to allow the construction of a major new highway.

It is therefore clear that, under both federal statutes and the Department of Interior's own standards, highways cannot be built across national parks for commercial, non-park purposes. The evidence is this case establishes without contradiction that this is the purpose of this road. We therefore submit that this Court should hold that the Secretary has no authority to permit its construction.

D. The Secretary of Interior Has No Authority To Allow An Electrical Transmission Line To Be Constructed Across Sequoia National Park

The construction of an electrical transmission line is planned across Sequoia National Park to serve the ski and summer resort (R. 40).[47] We submit that the Secretary of Interior has no authority to allow this line to be constructed.

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[47]While this issue was not raised by plaintiff specifically in its complaint, both the district court and court of appeals considered it properly before them (R. 194-195, 231-232).

1. *The Electrical Transmission Line May Not Be Constructed Without Approval from Congress*

Early in this century, Congress gave the Secretary authority to allow electrical lines to cross Sequoia National Park and national parks generally. In 1901, Congress gave the right to grant revocable "rights-of-way through the public lands, forest and other reservations of the United States, and Yosemite and Sequoia National Parks, for electrical plants, poles and lines for the generation and distribution of electrical power. . . ." 16 U.S.C. 79. Subsequently, in 1911, Congress gave the Secretary of Interior the authority "to grant an easement for rights-of-way, for a period not exceeding fifty years . . ., over, across and upon the public lands and reservations of the United States [including national parks] for electrical poles and lines for the transmission and distribution of electrical power. . . ." 16 U.S.C. 5.

In the 1920's, Congress limited this authority of the Secretary both as to Sequoia and all national parks. In 1921, Congress passed a statute limiting the powers of the Federal Power Commission to allow hydroelectric development in national parks (16 U.S.C. 797a):

> [N]o permit, license, lease or authorization for dams, conduits, reservoirs, powerhouses, commission lines or other works for storage or carriage of water or for the development, transmission, or utilization of power, within the limits as constituted March 3, 1921, of any national park or national monument shall be granted or made without specific authority of Congress.

In 1926, in the same statute which enlarged Sequoia National Park, Congress provided (16 U.S.C. 45c):

> [N]o permit, license, lease or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water or for the development, transmission, or utilization of power within the limits of said park [Sequoia National

> Park] . . . shall be granted or made without specific authority of Congress.

Section 45c went beyond Section 797a by applying to all of Sequoia National Park since Section 797a applied to only the portion before enlargement in 1926. Section 450 is a special provision applying only to Sequoia National Park and no such provision has been adopted by Congress applying generally to land included in the national parks after 1921. Thus, this statute is one of many in which Congress has given special protection to Sequoia National Park even beyond that afforded other national parks.

Section 45c was adopted as part of the enlargement of Sequoia National Park in 1926 (44 Stat. 820), in part at the request of M. B. Greeley, Chief of the Forest Service. At hearings upon an earlier park enlargement bill in 1921, he stated as the Forest Service's position: "You cannot admit power development in canyons of that character [referring to canyons in the proposed enlargement] with artificial reservoirs and conduits, the erection of transmission lines, power dams, pipelines and all the rest of it, without largely destroying its natural character. I have seen this come about in a great many places in the West. It is not complete destruction, but the wonders of that country as a piece of nature's handiwork are going to be largely destroyed if commercial development sets in."[48] At another point in the same hearings, Greeley stated, "If the area is to be a national park its recreational and scenic values should be fully and absolutely protected so that they cannot be broken into by commercial development unless Congress should so decide."[49]

The statutory framework is therefore as follows: 16 U.S.C. 5 and 79 give the Secretary of Interior authority to allow the construction of all kinds of electrical lines (transmission or distribution) across Sequoia National Park. 16 U.S.C. 45c requires the Secretary to have approval from Congress before

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[48]Hearings on H.R. 7452 by the House Committee on Agriculture, December 13, 1921, 67th Cong., 2d Sess. 12.

[49]*Id.* at 11.

permitting electrical transmission lines in Sequoia National Park. Thus, if the electrical line in this case is a transmission line rather than distribution line, Congress has forbidden the Secretary from giving authorization for it.

The distinction between a transmission line and distribution line must be made, as with all statutory language, according to the "natural" and "ordinary" meaning of those words. *E.g., United States v. Temple,* 105 U.S. 97, 99 (1881); *Lynch v. Alworth-Stephens Co.,* 267 U.S. 364, 370 (1925); *Old Colony R.R. v. Commissioner,* 284 U.S. 552, 560 (1932); *Commissioner v. Brown,* 380 U.S. 563, 571 (1965).

The record in this case suggests, but is not absolutely clear, that the electrical line to be constructed will be a transmission line. The 1964 National Power Survey of the Federal Power Commission states (p. 27) that "[T]ransmission voltage presently in use range from 69 kilowatts to 345 kilowatts. Lower voltages are generally associated with distribution lines. Since the record indicates that the line in this case will be 66 kilowatts (R. 40), which is not a standard voltage, it is likely that the line will be carrying 69 kilowatts. This issue—whether the line is a transmission or distribution line—can only be resolved through an evidentiary hearing in the district court.

The court of appeals held that 16 U.S.C. 45c applies "only to the construction and development of hydroelectric projects and related facilities including power lines" (R. 232). If the court of appeals is correct, then the issue as to whether the proposed line is a transmission or distribution line is irrelevant since the Secretary can authorize either kind of line as long as it is independent, as in this case, of a hydroelectric project. We submit that this issue should be resolved by this Court so that the district court can apply the appropriate law in its hearing on remand.

There is no doubt that the principal purpose of 16 U.S.C. 45c was to prohibit hydroelectric projects in Sequoia National Park. As the testimony of M. B. Greeley quoted above shows, there was great concern that the valleys of Sequoia National Park would be permanently flooded by

hydroelectric projects. The Sierra Club urged the enlargement of Sequoia National Park in order to protect the valley floors.[50] And a Senate Committee report preceding the 1926 act states that the language of 16 U.S.C. 45c was adopted to "prohibit the development of hydroelectric power in the . . . enlarged park." H. Rep. No. 583, 67th Cong., 2d Sess. 2 (1922).

Nonetheless, while Congress was principally interested in enacting Section 45c preventing the construction of hydroelectric projects without its own approval, it explicitly went further. If it had intended to prohibit only hydroelectric projects, it could simply have prohibited dams, reservoirs, and the like which are absolutely essential to such projects without the approval of Congress. Instead, Congress also specifically prohibited transmission lines without its approval.

This Court has often said that statutes should be construed according to their plain meaning. As Chief Justice Marshall stated early in the history of this Court in *Pennington v. Coxe*, 6 U.S. (2 Cranch) 34, 52-53 (1804): "That a law is the best expositor of itself . . . are among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged." This Court has often held that legislative history need not be relied upon when "the words of the Act are plain and their meaning is apparent without the necessity of resorting to the extraneous statements and often unsatisfactory aid of [committee] reports." *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 347, 356 (1922). Accord, *e.g., Wilbur v. United States*, 284 U.S. 231, 237 (1931); *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85, 89 (1935). Similarly, the words of a statute cannot be ignored in order to construe it according to its general purpose. *Hadden v. Collector*, 72 U.S. (5 Wall.) 107, 111 (1866); *Commissioner v. Gordon*, 391 U.S. 83, 93 (1968).

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[50] 12 *Sierra Club Bulletin* 77 (1924); *id.* at 298 (1926).

We submit that an electrical transmission line, as 16 U.S.C. 45c specifically states, cannot be built without the approval of Congress. If this Court so holds, an evidentiary hearing should be held in the district court to determine whether the proposed electrical line is a transmission line within the meaning of the statute.

2. *The Electrical Transmission Line May Not Be Constructed Because It Serves Commercial Non-Park Purposes*

We have seen above (pp. 116-119) that the Secretary of Interior has no authority to allow a highway to be built across Sequoia National Park for a non-park purpose. The same argument applies equally to an electrical transmission line. Consequently, whether the line is a transmission or distribution line, it is not within the power of the Secretary to authorize.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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